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No. 93-

In The

Supreme Court of the United States

October Term, 1993

BRIAN DICKERSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

HERSCHEL P. FINK
(Counsel of Record for Petitioner Brian Dickerson)
MICHAEL A. GRUSKIN
HONIGMAN MILLER SCHWARTZ and COHN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800

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QUESTIONS PRESENTED

I. Is the Court of Appeals' Interpretation of Section 552(b)(7)(A) in the Freedom of Information Act, permitting the Government to withhold release of every document in the FBI's 400 volume file concerning the 1975 disappearance of labor leader Jimmy Hoffa, consistent with this Court's holdings in *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and *Department of Justice v Landano*, ___ U.S. ___, 113 S.Ct. 2014 (May 24, 1993), which require that the Government prove that a FOIA exemption applies and that FOIA exemptions be strictly and narrowly construed in favor of disclosure?

II. Did the Court of Appeals err in affirming the district court's summary judgment ruling that a "concrete prospective law enforcement proceeding" exists concerning the disappearance of Jimmy Hoffa 18 years ago, where public statements from FBI officials have expressed doubt that any prosecution is likely to ever occur?

III. Does the Court of Appeals' decision, which held that Section 552(b) in the Freedom of Information Act does not require the Government to segregate and produce any non-exempt material in the Government's files concerning Jimmy Hoffa, conflict both with the decisions of other Courts of Appeals and the explicit language of FOIA?

PARTIES TO THE PROCEEDING

There are no other parties to this proceeding besides those listed in the caption. Pursuant to Rule 29.1 of this Court, petitioner states that he filed this action in his capacity as an employee of Detroit Free Press, Inc., and that Detroit Free Press, Inc. is a wholly owned subsidiary of Knight-Ridder, Inc.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Dickerson ("Petitioner"), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this civil action on April 30, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a)[1] affirming the decision of the United

[1] Citations herein to material printed in the Appendices appear as "___ a".

States District Court for the Eastern District of Michigan is reported at 992 F.2d 1426 (6th Cir. 1993). The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (33a) is not reported. The memorandum opinion and order of the United States District Court for the Eastern District of Michigan denying Petitioner's motion for summary judgment and denying Respondent's motion for summary judgment (35a) is not reported. The memorandum opinion and order of the United States District Court for the Eastern District of Michigan denying Respondent's motion for reconsideration and granting Respondent's renewed motion for summary judgment (40a) is reported at 1991 WL 337422 (E.D. Mich. 1991). The memorandum opinion and order of the United States District Court for the Eastern District of Michigan denying Petitioner's Motion for Reconsideration (47a) is reported at 1992 WL 112229 (E.D. Mich. 1992).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on April 30, 1993; the order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* was entered on August 3, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

5 U.S.C. § 552(b)(7)(A) provides in pertinent part as follows:

> (b) This section does not apply to matters that are –
>
> * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . .

The last sentence of 5 U.S.C. § 552(b) provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT OF THE CASE

On July 30, 1975, James R. Hoffa ("Hoffa") disappeared from the Machus Red Fox Restaurant in Birmingham, Michigan. The Justice Department (the "Government") launched an intensive nationwide search for Hoffa through the Federal Bureau of Investigation ("FBI") and the Organized Crime Task Force in Detroit. Hoffa's abduction was so highly publicized that it became one of the best known unsolved crimes of the century. The entire nation was asking – on bumper stickers, in national headlines, in the movie theaters, and at the

dinner table – "Who killed Jimmy Hoffa?" Despite enormous pressure to do so, the Government has never answered that question.

To this day, more than 18 years after the search began, the Government's highly publicized investigation into Hoffa's abduction has produced no warrants, no indictments, and no convictions. Nor, at this point, is there any reason to believe that the Hoffa investigation will ever result in criminal proceedings. Indeed, the former Agent in charge of the FBI's Detroit office, Kenneth Walton, has publicly stated that the FBI knows who killed Hoffa, but that no prosecution is now possible. (The articles in the record containing these statements are reprinted in the appendix at 74a.) In addition, the FBI's then Executive Assistant Director, Oliver B. Revell, testified before Congress on April 11, 1988 that it was "doubtful at this point we will ever have sufficient evidence to bring . . . [those responsible for Hoffa's disappearance] to trial." (The Revell testimony is reprinted in the appendix at 81a.)

In 1989, Petitioner requested access under the Freedom of Information Act ("FOIA") to Government records and documents pertaining to Hoffa's disappearance. The investigation is documented in two large files, one maintained in the FBI's field office in Detroit, and the other at FBI headquarters in Washington D.C. At the time of the FOIA request by Petitioner, the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes. When the requests were denied, Petitioner sued the Government under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly.

The Government filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserted that no documents had been improperly withheld. Relying on 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)"), the Government claimed that release of the records and documents "could reasonably be expected to interfere with enforcement proceedings."

The parties filed cross-motions for summary judgment. The Government's motion was accompanied by two "declarations" or affidavits, in which two FBI headquarters officials stated that the Hoffa investigation was still pending.[2] The district court initially denied both motions, finding there was an issue of fact whether the prospect of future enforcement proceedings "had been abandoned or are no more than merely 'conceivable.' " The Government then filed a motion for reconsideration and a renewed motion for summary judgment. The renewed motion contained an additional declaration similar to those the Government had submitted in its initial summary judgment motion.

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[2] One of the declarations characterized the 400 volumes of documents in the Hoffa investigation files in the following eight categories: (1) Documents setting forth leads to be conducted; (2) Documents containing information received from confidential informants; (3) Information and documents provided by local law enforcement; (4) Interviews of third parties and cooperating witnesses; (5) Public source information such as newspaper clippings and press releases; (6) Public and sealed court documents; (7) Laboratory reports setting forth results of examinations; and (8) Polygraph worksheets and reports.

In response to the Government's motion for reconsideration and renewed motion for summary judgment, Petitioner asked the district court to permit him to depose key FBI officials and to order the Government to produce a "Vaughn index"[3] or to review *in camera* several specific categories of documents covering all the years of the investigation. Petitioner also noted that the additional declaration submitted by the Government was essentially identical to one filed in a Freedom of Information Act suit brought in federal district court in Missouri by Mr. Hoffa's daughter, St. Louis County Associate Circuit Judge Barbara Crancer, in which the Government had been ordered to produce a Vaughn index.[4] The Missouri proceeding had disclosed the existence of two categories of documents not previously disclosed by the Government in this action: documents containing the results of high-level strategy conferences, with synopses of the

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[3] A "Vaughn index," which takes its name from a technique developed in *Vaughn v Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure.

[4] Judge Crancer's action seeks disclosure of a portion of the files sought in this case. The district court ordered the Government to produce a Vaughn index of the Hoffa file. A panel of the Eighth Circuit upheld this order, but the *en banc* court reversed in August, 1993. *In re Department of Justice*, 999 F.2d 1302 (8th Cir. 1993) (*en banc*). The issue in Judge Crancer's case – whether a district court has the authority to order the Government to produce a Vaughn index in a case involving Exemption 7(A) – is not present in this case. Petitioner has been informed that Judge Crancer will file a petition for a writ of certiorari asking this Court to review the Eighth Circuit's *en banc* decision.

investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. These documents apparently span the 18 years of the investigation, and Petitioner suggested to the district court that they might quickly reveal the true status of the Hoffa investigation. If the district court did not order the Government to produce a Vaughn index, Petitioner requested the district court to examine *in camera* these two discrete and succinct categories of documents identified by the FBI, as well as to permit depositions.

Instead of allowing the depositions or ordering production of the two categories of documents which Petitioner had requested, and which the Government had indicated a willingness to go through the headquarters' file and segregate, the district court accepted another Government suggestion that the court simply review records known as the "Moody file,"[5] and ordered only this file produced for an *in camera* examination. The Moody file consisted of documents selected solely by the Government and used by FBI agent Jim Moody to prepare

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[5] The Government's offer came after the district court, in a January 15, 1991 status conference that was not transcribed, stated that Petitioner should be permitted to depose the FBI declarants and other key officials. Petitioner subsequently noticed the depositions of these officials, and the Government moved for a protective order. The Government made its offer to produce the Moody file during the hearing on its motion for protective order. The magistrate judge then deferred ruling on whether Petitioner could depose the FBI officials.

his declaration in support of the Government's motion for summary judgment.[6]

After reviewing in secret only the documents proffered by the Government in the Moody file,[7] and giving Petitioner no opportunity for rebuttal or to cross-examine any Government affiants, the district court, without hearing oral argument, issued an order granting the Government's renewed motion for summary judgment. The district court held – based upon the declarations and its review of the Moody file – that all of the Government's files relating to the disappearance and presumed murder of Jimmy Hoffa were exempt from production under Exemption (7)(A).

Petitioner filed a Motion for Reconsideration, arguing that the district court's decision to review *in camera*

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[6] It appears that the two categories of documents that Petitioner requested the district court to review are not included in the Moody file. Neither the district court nor the Court of Appeals stated that it had examined these categories of documents. Further, the Government stated in a hearing in the district court that it was "pretty sure" these two types of documents were not in the Moody file. *See* Tr. of March 13, 1991 Telephone Hearing in *Dickerson v Department of Justice*, p. 30.

[7] In its brief in the Court of Appeals, the Government revealed that the Moody file contains approximately 335 pages out of the 400 volume Hoffa file. The Court of Appeals for the Eighth Circuit stated that the files requested by Judge Crancer contained 13,800 documents. *In re Department of Justice*, 950 F.2d 530, 535 (8th Cir. 1991), *rev'd on rehearing en banc*, 999 F.2d 1302 (8th Cir. 1993). Since Petitioner requested more files than Judge Crancer, and made his request at a later time, it is logical to conclude that the files requested by Petitioner contain many more documents.

only those documents proffered by the Government denied Petitioner the benefits of the adversary process. Petitioner also contended that, even if some of the documents were exempt from disclosure, the portions of the documents which did not compromise the investigation or which were not exempt must be disclosed to Petitioner pursuant to 5 U.S.C. § 552(b).

On March 13, 1992, the district court denied Petitioner's motion for reconsideration. The district court stated that it acted within its discretion in utilizing an *in camera* review to make its decision. It did not address Petitioner's contention that the non-exempt portions of the Hoffa files had to be released.

Petitioner appealed the district court's decisions. By a 2-1 vote, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision regarding Exemption 7(A).[8] The majority held that the procedure followed by the district court was permissible, that the district court was correct in finding that there was still a reasonable prospect of a prosecution being brought, and that the district court correctly concluded that production of the records sought by Petitioner could reasonably be expected to interfere with a future prosecution.

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[8] The concurring district judge conceded that this was a "close" question. The lead opinion only analyzed the Government's arguments concerning Exemption 7(A). The concurrence also discussed four other exemptions which were neither briefed by the parties in the district court, nor relied on by the district court in its ruling.

The dissenting judge concluded that the Government had fallen "woefully short" in satisfying its burden of proving that the documents fell within Exemption 7(A). She noted that the Moody file was "an admittedly non-representative packet of secret documents," that "categories such as 'information and documents provided by local law enforcement' and 'public and sealed court documents' are 'not sufficiently distinct to allow a court to determine . . . whether the specific claimed exemptions are properly applied,' " and that "a category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide 'adequate detail and justification' to satisfy the claimed exemption." 992 F.2d at 1437-38 (Batchelder, J., dissenting) (quoting in part *Vaughn v United States*, 936 F.2d 862 (6th Cir. 1991)).

Judge Batchelder also dissented from the majority's decision not to remand the case to the district court to force the FBI to disclose any reasonably segregable portion of the Hoffa files as required by 5 U.S.C. § 552(b). She emphasized:

> [FOIA] does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the case law indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress' priorities.

992 F.2d at 1438 (Batchelder, J., dissenting).[9]

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[9] In response to the majority's decision that any segregable information would likely be "useless," Judge Batchelder stated

Subsequently, Petitioner timely filed a petition for rehearing and a suggestion for rehearing *en banc*. On August 3, 1993, the petition for rehearing and suggestion for rehearing *en banc* were denied.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Conflicts With Decisions of This Court and Raises Important Questions Concerning FOIA

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " *Department of Justice v Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989); *see also John Doe Agency v John Doe Corp.*, 493 U.S. 146, 151 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting *EPA v Mink*, 410 U.S. 73, 80 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " *John Doe Corp.*, 493 U.S. at 152 (quoting *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). It requires "full agency disclosure unless information is exempted under clearly delineated

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that it is "not our place to judge whether the material a citizen requests from the government is 'useless.' " 992 F.2d at 1438.

statutory language." *Department of the Air Force v Rose*, 425 U.S. 352, 372 (1976). The exemptions are to be "narrowly construed." *Id; Department of Justice v Landano*, ___ U.S. ___, 113 S.Ct. 2014, 2024 (May 24, 1993) ("[O]ur obligation [is] to construe FOIA exemptions narrowly in favor of disclosure . . . ").

This Court has stated that " 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " *John Doe Corp.*, 493 U.S. at 152 (quoting *Rose*, 425 U.S. at 361). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. *Department of Justice v Tax Analysts*, 492 U.S. 136 (1989); *see also* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action.")

The Government must provide detailed proof sufficient to allow a district court to make a *de novo* determination of whether a particular exemption is applicable. *E.g., Doyle v Federal Bureau of Investigation*, 722 F.2d 554, 555-56 (9th Cir. 1983). With respect to the enforcement proceedings exemption in particular, "the government must show, by more than a conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding," *e.g., Campbell v Department of Health and Human Services*, 682

F.2d 256, 259 (D.C. Cir. 1982), or with a "concrete prospective law enforcement proceeding." *E.g., Carson v Department of Justice*, 631 F.2d 1008, 1018 (D.C. Cir. 1980).[10]

In *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Court addressed the burden that the Government bears when asserting Exemption 7(A). The Court interpreted Exemption 7(A) to require the Government to

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[10] Petitioner acknowledges that, under this Court's decision in *NLRB v Robbins Tire & Rubber Co*, 437 U.S 214 (1978), the Government can justify the assertion of Exemption 7(A) on a "category-of-document" basis rather than by proceeding document-by-document. Nevertheless, as explained below, the Government must still establish a causal connection between specific documents and potential interference, and must define categories in a manner that enables a court to determine whether the specific exemption applies to that category.

An earlier version of Exemption 7(A) exempted records whose production "would" interfere with enforcement. In 1986, Congress amended FOIA and changed "would" to "could reasonably be expected to." This change did not substantially alter the Government's burden. *See North v Walsh*, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989) (Ginsburg, J.) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting *Reporters Committee for Freedom of the Press v Department of Justice*, 816 F.2d 730 (D.C. Cir.), *modified on reh'g*, 831 F.2d 1124 (1987), *rev'd on other grounds*, 489 U.S. 749 (1989)). *See also* 132 Cong. Rec. S14270-01 (1986) (attachment to Sen. Leahy's statement) (stating that 1986 amendment to Exemption 7(A) would "not seem to materially alter the construction that the courts have already given to the provision."); 132 Cong. Rec. H9455-05 (statement of Rep. English) ("[T]he changes to the seventh exemption only codify existing law. Except for a slight expansion of exemptions (7)(E) and (7)(F), no information that is subject to disclosure today will be withholdable under the revised seventh exemption.")

prove that "with respect to *particular kinds of enforcement proceedings,* disclosure of *particular kinds of investigatory records* would generally . . . 'interfere with enforcement proceedings.' " *Id.* at 236 (emphasis added). Thus, the Court made clear that the Government must establish a causal connection between specific documents and potential interference.[11] The Court also held that a court may not grant " 'blanket exemptions' for government records simply because they were found in investigatory files compiled for law enforcement purposes." *Id.* at 237. However, the Court of Appeals' decision cannot be reconciled with this Court's rulings, or those of other Courts of Appeals.

A. The Court of Appeals Erred in Affirming a Summary Judgment Decision That a Concrete Prospective Law Enforcement Proceeding Exists

In *Robbins Tire,* this Court also recognized that the passage of time is relevant to determining whether there is a concrete prospective law enforcement proceeding. *See Robbins Tire,* 437 U.S. at 232 (referring to legislative history stating that "with the passage of time, . . . when the investigation is all over and the purpose and point of it

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[11] Other Courts of Appeals have also required the Government to demonstrate a more specific relationship between the claimed exemption and the specific documents than the Court of Appeals required in this case. *See, e.g., Bevis,* 801 F.2d at 1389 (The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' ") (quoting *Crooker v Bureau of Alcohol, Tobacco and Firearms,* 789 F.2d 64, 67 (D.C. Cir. 1986.)) In this case, the Court of Appeals did not require the Government to prove this link.

has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure.")

It is undisputed that there is no pending enforcement proceeding. However, the Court of Appeals held that Assistant Director Baker's declaration was sufficient, by itself, to establish as a matter of law the existence of "a concrete prospective law enforcement proceeding," as required under Exemption 7(A). Under the Court of Appeals' ruling, the Government's declarations, not subject to cross examination, constitute irrebutable proof that there is a "concrete prospective" proceeding. *See* 992 F.2d at 1431. ("As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.") However, the Court of Appeals' uncritical acceptance of the Government's declarations is not supported by the record nor this Court's decisions. Further, the proof that the Government must present to satisfy its burden is an important issue that should be considered by this Court.[12]

The Court of Appeals' affirmance of summary judgment is inconsistent with this Court's rulings. In *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court held that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the

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[12] This Court has previously recognized that "the mere fact that the burden [of proof] is on the Government to justify nondisclosure does not, in our view, aid the inquiry as to what kind of burden the Government bears." *Robbins Tire*, 437 U.S. at 224.

nonmoving party." *Id.* at 248. In this case, Baker's declaration is directly contradicted by statements made by present and former Justice Department officials. If anything, these statements[13] that no prosecution is possible, which were made outside the context of this litigation, are more credible than those proffered by the Government in opposing the FOIA request. Indeed, these statements initially led the district court to conclude in denying the Government's initial summary judgment motion that a "material issue of fact" existed as to whether there was a "concrete prospective law enforcement proceeding." In light of this evidence, the Court of Appeals erred by accepting the Government's claim that a "concrete prospective law enforcement proceeding" exists based on Baker's declaration and the unrepresentative Moody file. The length of time since Hoffa's disappearance and the statements by two knowledgeable government officials raised a factual issue about whether a "concrete prospective" proceeding exists. *Nevas v Department of Justice,* 789 F.Supp. 445, 448 (D.D.C. 1992)

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[13] One of these statements was made by a then higher ranking FBI official, Executive Assistant Director of Investigations Revell. Revell made this statement while testifying before Congress, and in the presence of then-Director Sessions. The other statement expressing doubt about the future possibility of any prosecution was made by the former head of the FBI's Detroit office. These statements demonstrate that a genuine issue of material fact exists and that, had Petitioner been given an opportunity to take the discovery he requested of the FBI's declarants and others, he could have ultimately convinced the trier of fact of his position. The Government never suggested in either the district court or the Court of Appeals that these statements are untruthful.

(Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings "unless there is at least a reasonable chance that an enforcement proceeding will occur. . . . "), *vacated and remanded, Mapother v Department of Justice,* ___ F.3d ___ (D.C. Cir. 1993) (available at 1993 WL 356083).[14]

In this (as in every) FOIA case, Petitioner (and, to some extent, the court) is forced to guess at the truth which only the Government knows. Given the imbalance of information, the adversary system courts normally rely on is distorted. *E.g., Vaughn v Rosen,* 484 F.2d at 824 ("This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system."). Petitioner presented two statements by government officials which cast doubt on the Government's assertion that there is a concrete prospective law enforcement proceeding. As the district court initially held, these statements create a genuine issue of material fact. Petitioner, however, was prevented from gathering additional evidence to support his claim, and from examining the Government's affiants. Unless this Court reviews the Court of Appeals' ruling, Exemption 7(A) will become an irrebutable blanket exemption on which the Government can prevail solely by filing a declaration. The Court of Appeals' ruling is inconsistent with this Court's rulings both on the standard for summary judgment, as well as on the narrow interpretation given to FOIA exemptions. This Court should grant the petition for a writ of certiorari to settle the question of how heavy

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[14] The Court of Appeals in this case adopted the *Nevas* standard. *See* 992 F.2d at 1430.

a burden the Government bears in proving that there is a likelihood of an enforcement proceeding being brought.

B. The Court of Appeals Erred in Holding That the Government Satisfied Its Burden of Showing That Release Would Interfere With Enforcement Proceedings

It is well established that, to satisfy Exemption 7(A), the Government must also prove that release of the requested documents "would *in some particular discernible way*, disrupt, impede or otherwise harm the enforcement proceeding." *North v Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (Ginsburg, J.) (emphasis added). The Court of Appeals, while giving lip service to the fact that the Government has the burden of proof, turned this requirement on its head by deferring to the Government's conclusory assertion that release of the documents would interfere, despite the general nature of the Government's categories and the lack of evidence showing the causal connection between specific categories of documents and potential interference.

In making its ruling, the Court of Appeals relied heavily on its view that the documents in the Moody file (which were the only documents reviewed by either the district court or the Court of Appeals) were selected "for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it *in camera*." 992 F.2d at 1432. What the Court of Appeals ignored, however, was the fact that these documents are *not* representative of the 400 volume Government file on the Hoffa

disappearance.[15] The purpose of all the declarations (including Moody's) filed in the district court was to show that there was an *ongoing investigation* and that the Government was entitled to summary judgment. Thus, these advocacy documents obviously included only fresh inquiries and other information that *supported* the Government's position. *See* Llewellyn Declaration ("the purpose of this declaration is to . . . justify the propriety of the FOIA exemption claimed by the Government.") As Judge Batchelder (who was obviously unimpressed after reviewing the Moody file) noted in her dissent, the Government "handed the court an admittedly non-representative packet of secret documents to inspect in chambers." 992 F.2d at 1438. This inherently selective and one-sided presentation (upheld by the Court of Appeals) could not allow the district court to make the *de novo* review of the Government's claim which both the statute and this Court's decisions require.

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[15] Indeed, in its opposition to the suggestion for rehearing *en banc*, the Government conceded that the documents in the Moody file "were never meant to be 'representative,' in an evidentiary sense, of the entire Hoffa file." Government Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, Case No. 92-1458, p. 6. Contrary to the Government's assertion in the Court of Appeals, it is also clear that the Moody file was used by the Court of Appeals to determine whether release of the Hoffa files would interfere with enforcement proceedings. *See, e.g.*, 992 F.2d at 1434 (Beckwith, J., concurring) ("My review of the Moody file further suggests that . . . nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, . . . ") Thus, it is essential that the documents reviewed accurately portray the investigation.

The Court of Appeals' ruling conflicts with the decisions of other Courts of Appeals, which have required the Government to show the level of "interference" necessary to satisfy Exemption 7(A) with respect to *each* such proceeding and *each* category of documents. *See, e.g., North v Walsh, supra; Campbell v Department of Health and Human Services,* 682 F.2d 256, 265 (D.C. Cir. 1982) (Ginsburg, J.) ("the submissions must demonstrate *specifically* how each document or category of documents, if disclosed, would interfere with the investigation" (emphasis added)). The Government's categorization of documents in the Hoffa files has already been found unsatisfactory by one court.[16] As the dissent noted, "categories such as 'information and documents provided by local law

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[16] *In re Department of Justice,* 950 F.2d 530 (8th Cir. 1991), *rev'd on reh'g en banc,* 999 F.2d 1302 (8th Cir. 1993). The panel decision (upholding the district court's order that a Vaughn index of the Hoffa files be prepared) found the district court's dissatisfaction with the Government's affidavits (similar to those submitted in this case) to be "understandable given the Government's assertion that 13,800 documents accumulated over a 15-year span fit neatly into nine categories described over the course of five pages." 950 F.2d at 535. Even in its *en banc* decision, the majority expressed no opinion on the issue of whether the categorical index of the Hoffa files submitted by the Government is adequate. 999 F.2d at 1309 n.4. In this case, the Government used only eight categories to describe an even greater number of documents. By itself, the conclusory and generalized content of the Government's declarations raises serious questions about the validity of the Government's search and categorization of the documents. *Cf. Wiener v FBI,* 943 F.2d 972, 978 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 3013 (1992) (court found FBI's affidavits insufficient to support claimed exemptions; court noted FBI's use of "boilerplate" explanations drawn from a "master" FOIA response.)

enforcement' and 'public and sealed court documents' are 'not sufficiently distinct to allow a court to determine . . . whether the specific claimed exemption(s) are properly applied.' " 992 F.2d at 1437 (quoting *Vaughn*, 936 F.2d at 868).

The inadequacy of the Government's categories can be seen through an example. Petitioner asked the district court to review two discrete categories of documents containing results of strategy conferences and status reports to the FBI director. On its face, however. these types of documents do not fall within *any* of the categories used by the Government. The Government's conclusory declarations clearly do not show the required "link between the nature of the document and the alleged likely interference." *Bevis v Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).[17]

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[17] It is also unclear whether each document in the Hoffa files has been reviewed by the Government. The Government asserted in the Court of Appeals that a "fair reading" of the declarations makes clear that all documents in both FBI files (in Washington, D.C. and Detroit) have been examined, and that all "public source information" (category five) will be made available. Government's Brief in No. 92-1458 at 36 n. 13. However, since the Government has the burden of proving that Exemption 7(A) applies, any ambiguity in its declarations must be construed against it. Further, its willingness to provide "public source information" to Petitioner demonstrates the inadequacy of the Government's declarations. The "public source information" which the Government has stated it is willing to release is a *different* category than "public and sealed court documents," which obviously contains non-exempt documents. Thus, it is not clear whether the Government is claiming that all "public and sealed court documents" are exempt. Indeed, under the Government's theory of exemption, if the category of

Further, as Judge Batchelder also noted in her dissent, the Government must do more than merely show that the documents fit in a particular category. "A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide 'adequate detail and justification' to satisfy the claimed exemption." 992 F.2d at 1437 (quoting in part *Vaughn*, 936 F.2d at 869). In contrast, in other cases where the Government has relied on declarations, the declarations "provid[ed] the detail and specificity comparable" to a Vaughn index. *E.g., Vaughn*, 936 F.2d at 869. The government's affidavit in that case discussed the legal grounds relied on in withholding specific documents contained within each category and summarized, *by document page number*, the exemption relied on for withholding each page. *Id.* at 868.[18]

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documents entitled "public and sealed court documents" is deemed to be exempt, *every* document therein (including "public court" documents) is exempt from disclosure. *See* Government's Brief in No. 92-1458 at 42 ("Once it is determined that a category of documents is protected under Exemption 7(A), *every document in the category is exempt.*" (emphasis in original)). Under the Government's interpretation of Exemption 7(A), it can withhold non-exempt documents through broad or creative categorization.

[18] Even those courts which have held that a Vaughn index need not be produced as a matter of course where the Government claims an exemption from disclosure under Exemption 7(A) have required a greater showing by the Government than was made here. In *Bevis*, 801 F.2d at 1389-90, the court held:

> If it wishes to adopt the generic approach [of grouping documents into categories], the FBI has a threefold task. First, it must define its categories functionally. Second, it must conduct a document-by-

The declarations submitted by the Government in the instant case are not nearly as detailed. As Judge Batchelder recognized:

> For example. while the Government has told us that the Hoffa file contains informant interviews . . . it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing *any* of them could harm the ongoing investigation.

992 F.2d at 1438 (emphasis in original; footnote omitted.)[19] The Court of Appeals' decision contravenes the

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> document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.

The conclusory declarations filed by the Government in the instant case do not satisfy this standard. As noted earlier, categories of documents such as "public and sealed court documents" by definition contain documents not subject to exemption, and provide no basis for the district court to assess the Government's assertions. *See, e.g., Bevis*, 801 F.2d at 1390 (remanding case to district court for more specific inquiry where FBI provided insufficient information to test assertion of exemption.)

[19] Judge Batchelder was also suspicious of the Moody file, whose supposed representativeness was relied on so heavily by the Court of Appeals. 992 F.2d at 1438 n. 2 ("Allowing us to peek at a few documents from the Hoffa file [compiled to help Agent Moody prepare his affidavit] does nothing to prove that the rest of the file is exempt.")

requirements of *Robbins Tire*, turns the Government's general categories into prohibited "blanket exemptions," *Bevis*, 801 F.2d at 1389, and ignores the statutory requirements reflected in FOIA.

II. The Court of Appeals' Decision That Non-Exempt Portions of Records Need Not Be Produced Is Contrary to the Explicit Language in FOIA and Is in Conflict With Other Courts of Appeals

Under FOIA, administrative agencies *"shall"* provide "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. §552(b) ("Section 552(b)") (emphasis added). Other Courts of Appeals have held that "[t]he 'segregability' requirement applies to *all* documents and *all* exemptions in the FOIA." *Schiller v NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (emphasis added).

However, the Court of Appeals ignored this principle and ruled that this explicit statutory command "must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned." 992 F.2d at 1434. Based on its review of 335 *pages* of a 400 *volume* file, the Court of Appeals declined to remand the case to require the Government to comply with this statutory mandate.

Left undisturbed, the Court of Appeals' reasoning effectively (and improperly) creates an additional exemption for 7(A) materials beyond that which Congress wrote into FOIA. Contrary to both the rule in other Circuits and

FOIA's explicit language, the Court of Appeals in substance held that the segregability requirement in Section 552(b) does not apply when Exemption 7(A) is involved.[20]

Further, the Court of Appeals provided no basis for its leap of logic that, based on the hand-picked Moody file (representing probably less than one percent of the

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[20] Other Courts of Appeals have reversed district court decisions which did not make a finding on segregability. *See Mapother v Department of Justice*, ___ F.3d ___ (D.C. Cir. 1993) (available at 1993 WL 356083, *11) (remanding for district court to make segregability analysis in Exemption 7(A) case); *Powell v United States Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991) ("It is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof.") (quoting *Church of Scientology v Department of Army*, 611 F.2d 738, 744 (9th Cir. 1979)); *Schiller v NLRB*, 964 F.2d 1205 (D.C. Cir. 1992) (same); *Wiener v FBI*, 943 F.2d at 988 (failure to make such findings constitutes "reversible error").

In the Court of Appeals, the Government claimed that the segregability requirement does not apply to Exemption 7(A) cases. In addition to being contrary to the plain language of FOIA (which contains no such limitation) and to decisions by other Courts of Appeals, it is contrary to common sense. The obligation imposed on the Government by Section 552(b) is distinct from the determination of whether one of the FOIA exemptions apply. The fact that the Government can justify its Exemption 7(A) claim through a category of document approach does not relieve it from the separate statutory obligation of segregating and disclosing non-exempt portions of documents.

If the Government's position were correct, Section 552(b) would be superfluous: whenever Exemption 7(A) applies, the Government need not comply with Section 552(b). On the other hand, if Exemption 7(A) is held not to apply, the entire document would be produced and there would be no need to segregate pursuant to Section 552(b).

documents in the Hoffa files), the other 99 percent of the documents are not "reasonably segregable." As Judge Batchelder noted:

> [FOIA] does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the government to segregate its files if at all possible. Both the statute and the case law indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress' priorities.

992 F.2d at 1438. The Court of Appeals did not conclude that segregating non-exempt portions was unfeasible or that there was no non-exempt portion to segregate. Instead, the Court of Appeals said that any segregable material would be "useless" to plaintiff. The Court of Appeals' reliance on its value judgment is an unprecedented and inappropriate factor in its FOIA analysis, one which has no basis in the statute, and one which is flatly inconsistent with this Court's precedents. By itself, this issue is important enough that the petition for a writ of certiorari should be granted.

CONCLUSION

This petition does not involve the ultimate answer to the question of who killed Jimmy Hoffa. As Judge Batchelder observed in concluding her dissent, "it may well be that the Hoffa file should [eventually] remain a secret." 992 F.2d at 1439. But the important issue here, as

Judge Batchelder emphasized, is whether the Government met its "heavy burden," and in particular whether the peremptory and precipitous manner in which summary judgment was granted against the requestor of these presumptively public records was consistent with FOIA's requirements and this Court's decisions. To overcome the presumption of disclosure, the Government cannot, as it did here, merely rely on form affidavits and generalized assertions. Instead, it must satisfy its "heavy burden." To date, it clearly has not done so. The Courts of Appeals have interpreted this Court's FOIA decisions such as *Robbins Tire,* and various issues concerning Exemption 7(A), in conflicting ways which this Court should clarify. Accordingly, a writ of certiorari should issue to review the decision below.

Respectfully submitted,

HERSCHEL P. FINK
(Counsel of Record for
Petitioner Brian Dickerson)
MICHAEL A. GRUSKIN
HONIGMAN MILLER SCHWARTZ
and COHN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800

October 28, 1993

APPENDIX A

No. 92-1458

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN DICKERSON, *Plaintiff-Appellant,* *v.* DEPARTMENT OF JUSTICE, *Defendant-Appellee.*	)))))))	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed April 30, 1993

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge.*

NELSON, Circuit Judge, delivered the opinion of the court. BECKWITH, District Judge (pp. 17-18), delivered a separate concurring opinion. BATCHELDER, Circuit Judge (pp. 19-27), delivered a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. Pursuant to the Freedom of Information Act – a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them – plaintiff Brian

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* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding"[1] could still be discerned – *i.e.*, whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an *in camera* review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found

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[1] The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong. Rec. 17033 (1974), quoted in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978).

that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its *in camera* review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the investigatory files were not protected from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the *Detroit Free Press*, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining nondisclosure on the government, directs the court to determine the matter *de novo*. It also provides that the court "may examine the . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]. . . . "

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions . . . if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation."

The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal

proceedings, and the declaration sought to show why production of the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal

district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a *Vaughn* index on the smaller of the two Hoffa files,[2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance.[3]

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might

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[2] A "*Vaughn* index," which takes it [sic] name from a technique developed in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See *Osborn v. Internal Revenue Service*, 754 F.2d 195, 196 (6th Cir. 1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a *Vaughn* index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see *In re Department of Justice*, 950 F.2d 530 (8th Cir. 1991), but the panel decision has been vacated in connection with the granting of a rehearing *en banc*. See Order at 950 F.2d 538. As of this writing the *en banc* court has not announced its decision.

[3] The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief suggested that the court conduct an *in camera* review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a *Vaughn* index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, for *in camera* review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he

should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for *in camera* review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any *in camera* review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible *in camera* inspection by District Judge LaPlata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file *in camera*, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could

reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur. . . ." *Nevas v. Dept. of Justice*, 789 F.Supp. 445, 448 (D.D.C. 1992).[4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

Although requested to follow the lead of the district court in Missouri in ordering the compilation of a *Vaughn* index on the FBI headquarters file, Judge La Plata did not

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[4] Even where exemption (7)(A) has become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a *Vaughn* index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, *Ingle v. Dept. of Justice*, 698 F.2d 259 (6th Cir. 1983), where we indicated that a *Vaughn* index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents *in camera*. In the context of a case that did not involve exemption (7)(A), we have said that a *Vaughn* index should be obtained in "most" Freedom of Information Act cases. *Osborn v. Internal Revenue Service*, 754 F.2d 195, 197 (6th Cir. 1985).

As we subsequently explained in a *Vaughn* decision of our own, however, *Osborn* created no hard and fast rule with respect to *Vaughn* indices as such. *Vaughn v. United States*, 936 F.2d 862, 867 (6th Cir. 1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information." *Id.* The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-24 (1978)[5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had

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[5] The plaintiff in *Robbins Tire* was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " *Robbins Tire*, 437 U.S. at 236.

When *Robbins Tire* was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement records to the extent that disclosure "*could* reasonably *be expected* to interfere. . . . " (Emphasis supplied.) See Pub. L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in *Robbins Tire*, of course.

"expired." See *Robbins Tire*, 437 U.S. at 232, referring to legislative history indicating that "with the passage of time, . . . when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a *Vaughn* index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody filed [sic] had turned out not to be helpful, the court could obviously have moved on to an *in camera* inspection of the two groups of documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But

the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it *in camera*. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents *in camera* than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense,[6] and review of *any* documents *in camera* might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

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[6] Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III

A

The district court was correct, we believe, in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker – the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it – the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and

prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility – Assistant Director Baker – obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. *Robbins Tire*, 437 U.S. at 239. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation – an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads

the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi. . . . "

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. *See Robbins Tire*, 437 U.S. at 224. Having regard to the important public interest that

exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

> "Documents setting forth leads to be conducted.
>
> Documents containing information received from confidential informants.
>
> Information and documents provided by local law enforcement.
>
> Interviews of third parties and cooperating witnesses.
>
> Public source information such as newspaper clippings and press releases.
>
> Public and sealed court documents.
>
> Laboratory reports setting forth results of examinations.
>
> Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all non-exempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any lawbreaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is **AFFIRMED.**

SANDRA S. BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b) [sic]. The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted [sic] invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions . . . [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the non-disclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a *Vaughn* index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

ALICE M. BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " *Vaughn v. United States*, 936 F.2d 862, 865 (6th Cir. 1991) (quoting *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989)); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S. Ct. 471, 475 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)). The

Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " *John Doe Corp.*, 110 S. Ct. at 475 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1976) [sic]). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " *Vaughn*, 936 F.2d at 865 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). The exemptions are to be "narrowly construed." *Id.* " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " *John Doe Corp.*, 110 S. Ct. at 475 (quoting *Rose*, 425 U.S. at 361). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. *Vaughn*, 936 F.2d at 866 (citing *Department of Justice v. Tax Analysis*, 492 U.S. 136 (1989)).

A. *Existence of an ongoing law enforcement proceeding.*

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." *Vaughn*, 936 F.2d at 866 (citing *Ingle v. Department of Justice*, 698 F.2d 259, 267 (6th Cir. 1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the

question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

B. *Interference with an ongoing law enforcement proceeding.*

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A) [sic], *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986),[1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. *Id.* The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than

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[1] To restate, § 522(b)(7)(A) [sic] exempts "investigatory records compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. *See North v. Walsh*, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting *Reporters Committee for Freedom of the Press v. Department of Justice*, 816 F.2d 730 (D.C. Cir.), *modified on reh'g*, 831 F.2d 1124 (1987), *rev'd on other grounds*, 489 U.S. 749 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

FOIA cases seem to pit citizen suspicion against government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government document without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these . . . files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." *Campbell v. Department of Health & Human Services*, 682 F.2d 256 (D.C. Cir. 1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " *John Doe Corp.*, 110 S. Ct. at 475 (quoting *Rose*, 425 U.S. at 361). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application

> of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for the Government records simply because they were found in investigatory files compiled for law enforcement purposes." *Robbins Tire & Rubber Co.*, 437 U.S. at 237. The Government "must demonstrate *specifically* how each document or category of documents, if disclosed, would interfere with the investigation." *Campbell*, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. *Vaughn*, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the documents by categorizing them according to their content and nature, *Bevis v. Department of State*, 801 F.2d 1386, 1389

(D.C. Cir. 1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, *Vaughn*, 936 F.2d at 866. While courts have smiled on the use of *Vaughn* indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method . . . is mandated." *Id.* at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." *Vaughn*, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " *Bevis*, 801 F.2d at 1389 (quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue

as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. *Id.* at 869. While our decision in *Vaughn* is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in *Vaughn* did assign the documents to rather general categories, but she

> also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding *the specific documents contained within each category*. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding *each of the 1,000+ pages*.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing

any of them could harm the ongoing investigation.[2] *See Bevis*, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

Our decision in *Vaughn*, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed *Vaughn* index, it may create more general exempt categories and then show how each document fits into them, or it may haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A) [sic], the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly

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[2] A word on the "Moody file." Our decision in *Vaughn* makes it clear that *in camera* review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. *See Vaughn*, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

exempt, and then handed the court an admittedly non-representative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our *Vaughn* decision or with the Supreme Court's teachings on FOIA law.

C. *Segregability of portions of the file.*

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b) [sic]. This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." *Bevis*, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate the Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material citizen requests from the Government is "useless."

III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

APPENDIX B

No. 92-1458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN DICKERSON, Plaintiff-Appellant,	)	
v.	)	ORDER
DEPARTMENT OF JUSTICE, Defendant-Appellee.	)	

(Filed Aug. 3, 1993)

BEFORE: NELSON and BATCHELDER, Circuit Judges; and BECKWITH,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Hon. Sandra S. Beckwith sitting by designation from the Southern District of Ohio

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON,

Plaintiff,

C.A. No.
90-CV-60045-AA

vs.

HON. GEORGE La PLATA

DEPARTMENT OF
JUSTICE,

Defendant.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This action was brought by plaintiff Brian Dickerson, an editor of the Detroit Free Press, to compel the defendant United States Department of Justice to produce records pertaining to the disappearance of James Riddle Hoffa, under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"). The matter is pending on the parties' cross motions for summary judgment. Fed. R. Civ. P. 56.

The basic policy of the FOIA is for full agency disclosure, unless the requested information is specifically exempted by the Act. *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471, 475 (1989). The exemptions reflect the balance struck between the public right to know and the need of government to keep information confidential. *Id.*

The agency has the burden of sustaining its action. 5 U.S.C. § 552(a)(4)(B).

James Hoffa disappeared from the Machus Red Fox Restaurant in Birmingham, Michigan, on July 30, 1975. Defendant launched an extensive investigation through the Federal Bureau of Investigation ("FBI") and has two files pertaining to Hoffa's disappearance; a central file (of 67 volumes) and a field office file in Detroit (of 332 volumes).[1] On July 25, 1990, plaintiff requested access to records and documents pertaining to Hoffa's disappearance.

Defendant admits having custody and control over such records, but refused the request on the grounds that the documents are exempt from disclosure under § 552(b)(7)(A).[2] This section exempts:

> "(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . . "

An agency need not justify the exemption on a document-by-document basis, but may group documents into distinct functional categories, and show how the release of each category would likely interfere with the enforcement

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[1] The first is an extortion file and the second was opened as a missing person and changed to a labor racketeering investigation.

[2] Plaintiff's appeal from the decision was denied, except that the "public source information" would be released from the Detroit file on plaintiff's request.

proceedings. *Bevis v. Dept. of State,* 801 F.2d 1389 (D.C. Cir. 1986).

Summary judgment should be granted where, after adequate time for discovery and taking the evidence in the light most favorable to the non-moving party, the non-moving party fails to come forward with sufficient evidence to establish that there is a material question of fact for trial. *Celotex v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), *Street v. J.C. Bradford,* 866 F.2d 1472 (6th Cir. 1989). Summary judgment is not appropriate in a FOIA case when there is a dispute over "key factual premises" for determining whether release of information could reasonably be expected to interfere with enforcement proceedings, rather than where the dispute is merely over the conclusion. *Alyeska Pipeline Service Co. v. U.S. EPA,* 856 F.2d 309, 313 (D.C. Cir. 1988).

Plaintiff argues that the defendant cannot establish that disclosure of the requested documents would impede an enforcement proceeding, because (1) no criminal proceedings are pending or possible and (2) the defendant has not made the requisite showing of interference with respect to each category of documents. The defendant seeks summary judgment on the grounds that the documentary materials are exempt as a matter of law under § 552(b)(7)(A).[3]

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[3] The defendant maintains alternatively that the great majority of the investigative file is independently exempt under either § 552(b)(7)(C), (D) or (E), of the FOIA.

The materials must relate to a "concrete prospective law enforcement proceeding." *Bevis*, at 1389, quoting *Carson v. U.S. Dept. of Justice*, 631 F.2d 1008 (D.C. Cir. 1980). That is in contrast to the decisions prompting amendment in 1974, which held that entire investigatory files were exempt even after the investigation and enforcement proceedings were terminated, or where enforcement proceedings were not contemplated. See discussion *N.L.R.B. v. Robbins Tire & Rubber*, 437 U.S. 214, 227, 233, 98 S.Ct. 2311, 2319-2323 (1978), and *John Doe Agency*. To come within this exemption, enforcement proceedings may be pending or prospective, or even a dormant investigation could lead to prospective enforcement proceedings. *Southam News v. U.S. I.N.S.*, 674 F.Supp. 881, 887 (D.D.C. 1987).[4]

In its answer, the defendant admitted that there are no pending federal criminal proceedings directly related to the disappearance of James Hoffa. Plaintiff relies on the statements of Kenneth P. Walton, at his retirement from the FBI in June 1989. Walton, who headed the FBI's Detroit office from 1985 to 1988, was quoted in the newspapers as saying: "I'm comfortable I know who did it, but it's never going to be prosecuted because . . . we would have to divulge informants, confidential sources".

In response, defendant submits the affidavits of Special Agents Angus B. Llewellyn and Jim E. Moody, who

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[4] Both *Carson* and *Southam* rely on the decision in *National Public Radio v. Bell*, 431 F.Supp. 509 (D.D.C. 1977), where although the available leads had been pursued and the investigation was dormant, it was open, active and only some three years old.

are familiar with plaintiff's FOIA request, the documents and the investigation into the disappearance. They acknowledged that although instituted in 1975, the investigation has not resulted in charges being filed against any suspects. However, they state the investigation "continues to be actively pursued" and "is pending and ongoing". They indicate that new information, added to that already uncovered, could result in prosecution and that the FBI intends to continue to pursue certain theories and strategies with a view toward eventual criminal proceedings. Moody states that from his experience with investigations relating to activities of Organized Crime, it may take a long time to get information and conclude this investigation.

Walton's statement to the press was not an agency announcement that the investigation was concluded. However, it does suggest that the head of the Detroit office may have believed that criminal prosecution for Hoffa's disappearance would never be instituted. This and the fact that no charges have been brought or are imminent after more than fourteen years, raise a material issue of fact whether the prospect of future enforcement proceedings have been abandoned by the agency or are considered no more than merely "conceivable".

Accordingly, the plaintiff and defendant's cross motions for summary judgment are DENIED.

/s/ George La Plata
George La Plata
U.S. District Judge

January 10, 1991
Ann Arbor, MI

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE,

Defendant.
_____/

C.A. No. 90-CV-60045-AA

HON. GEORGE La PLATA

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION; GRANTING DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT; AND DISMISSING THE COMPLAINT

Plaintiff Brian Dickerson, Editor of the Detroit Free Press, filed this action on February 22, 1990, seeking to compel defendant, the United States Department of Justice to produce records under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA"), pertaining to the disappearance and presumed murder of James Riddle Hoffa. On January 10, 1991, the Court denied both plaintiff's motion and defendant's motion for summary judgment. On February 8, 1991, defendant filed the pending Motion for Reconsideration and Renewed Motion for Summary Judgment.

James Hoffa disappeared from the Machus Red Fox Restaurant in Birmingham, Michigan, on July 30, 1975. Defendant launched an extensive investigation through the Federal Bureau of Investigation ("FBI"), resulting in

the accumulation of two substantial files pertaining to Hoffa's disappearance totalling over 400 volumes.

Under the FOIA, requested information is to be disclosed unless it is specifically exempted by the Act. *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471, 475 (1989). The agency has the burden of sustaining its action. 5 U.S.C. § 552(a)(4)(B). Defendant claims that these records are exempt from disclosure under § 552(b)(7)(A), which exempts:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . .

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In FOIA cases, summary judgment should be denied where there is a dispute over a "key factual premise" for determining whether records or information are exempt from disclosure, but not where the dispute is merely over the conclusion to be reached. *Alyeska Pipeline Service Co. v. U.S. EPA*, 856 F.2d 309, 313 (D.C. Cir. 1988).

This Court's January 10, 1991 decision found that there was a key factual dispute whether the documents related to a "concrete prospective law enforcement proceeding" given the length of time since Hoffa's disappearance; the unofficial but public statements of Kenneth P. Walton, who headed the FBI's Detroit office from 1985 to 1988; and the conclusory statements in the affidavits of Special Agents Angus B. Llewellyn and Jim E. Moody

that the investigation "continues to be actively pursued" and is "pending and ongoing".

First, defendant seeks reconsideration of the January 10th order arguing that the disposition of its motion for summary judgment would have been different if the Court had not considered the inadmissible hearsay statement of Walton. Local Rule 17(m)(3). However, defendant did not object to the statement as inadmissible (Defendant's opposition to Plaintiff's motion, p. 6, n. 1). Furthermore, the most important factor to this Court was the length of time that has passed since Hoffa's disappearance without any indictments being filed. In addition, the statement was not considered for the truth of the matter asserted, but as impeachment of the FBI claim that the investigation continued toward a concrete prospective law enforcement proceeding. Therefore, the decision to deny defendant's motion for summary judgment would not have been different.

Next, defendants [sic] renews its motion for summary judgment relying on the additional affidavit of William M. Baker, Assistant Director of the FBI in charge of the Criminal Investigative Division, who reports to FBI Director William Sessions. The affidavit states in part that Baker's responsibilities include determining which investigations should be given priority and whether particular investigative efforts should continue. Having overall supervisory authority for the investigation into Hoffa's disappearance, Baker has allocated continued FBI resources to the Hoffa investigation which "still absorbs FBI management and field agent resources on a regular basis" (paragraph 6). Baker also states that based on his

knowledge of the investigation, he believes those responsible can be identified and prosecuted. In addition, Baker indicates that documents in the Hoffa files also pertain to other active criminal investigations into Organized Crime activities.

In response, plaintiff argues that Baker's affidavit adds nothing to the matter and strenuously urges that the Court require a *Vaughn* index or *in camera* inspection of certain documents. However, Baker's affidavit indicates in much more specific terms than the earlier affidavits that FBI time is regularly spent on the Hoffa investigation. In fact, his affidavit, in combination with the earlier affidavits, may be sufficient to establish that the records could reasonably be expected to interfere with a prospective law enforcement proceeding. The Court may accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency. *Spannaus v. U.S. Dept. of Justice,* 813 F.2d 1285, 1289 (4th Cir. 1987).

In plaintiff's continued effort to challenge the credibility of defendant's affidavits, plaintiff relies on comments made before the Permanent Senate Subcommittee on Investigations in April 1988, and erroneously attributed to FBI Director William Sessions. When asked if indictments were likely in relation to Hoffa's disappearance, Director Sessions said he was not prepared to comment. Then Executive Assistant Director of Investigations Oliver Revell volunteered that it was "doubtful at this point that we will ever have sufficient evidence to bring . . . [those responsible for Hoffa's disappearance] to trial". (p. 29).

While such a statement does not establish whether or not there is a concrete prospective law enforcement proceeding, it is sufficient in combination with the now almost 16 years since Hoffa's disappearance, to convince this Court to go beyond the affidavits. Defendant indicated that records referred to as the "Moody File" could be made available for *in camera* inspection. The "Moody File" represents the information compiled in order for Agent Moody to prepare his affidavit. Considering the quantity of documents contained in the FBI files, inspection of the "Moody File" is an appropriate method for the Court to make the necessary determination. *Bevis v. Dept. of State,* 801 F.2d 1386, 1390 (D.C. 1986).

This Court has had the opportunity to review each and every document contained in the "Moody File". As a result of a careful and thorough review, this Court is satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted. Despite the length of time that has passed and the inference of the public statements, *in camera* inspection mandates that the FBI files not be disclosed. The records also include information regarding other pending and prospective criminal proceedings. *NLRB v. Robbins Tire,* 437 U.S. 214 (1978).

The next inquiry is whether disclosure of this information, clearly compiled for law enforcement purposes, could reasonably be expected to interfere with the prospective law enforcement proceedings. The FBI need not justify the exemption on a document-by-document basis, but may group the documents into distinct functional categories and show how the release of each category

would likely interfere with the enforcement proceeding. *Bevis, supra.* The defendant has grouped the documents into the following proper functional categories: (1) documents setting forth leads to be conducted; (2) documents containing information received from confidential informants; (3) information and documents provided by local law enforcement; (4) interviews of third parties and cooperating witnesses; (5) public source information; (6) public and sealed court documents; (7) laboratory reports setting forth results of examination; and (8) polygraph worksheets and reports. (Affidavit of Agent Llewellyn pp 7-8). First, the public source information was to be made available upon plaintiff's request following the agency appeal.

With respect to the remaining categories, defendant specifies through the affidavits of Agents Llewellyn and Moody how disclosure could reasonably be expected to interfere with the prospective law enforcement proceedings and hinder the efforts to bring those responsible to justice. Namely, that disclosure would reveal the FBI's current knowledge regarding Hoffa's disappearance, the direction and scope of the current efforts the leads abandoned and those individuals considered prime suspects. With such information the perpetrator(s) could take steps to destroy or tamper with evidence, intimidate and threaten witnesses, construct a false alibi or fabricate other evidence. Also, disclosure could interfere with the ability to corroborate statements of witnesses or suspects. Each of these types of interference justify application of the exemption from disclosure under § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239 (1978), *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989).

For the reasons stated above, the Court finds that defendant has met its burden of establishing that the records contained in the FBI files were compiled for law enforcement purposes and that the production of these records could reasonably be expected to interfere with concrete law enforcement proceedings. Therefore, defendant's motion for reconsideration is DENIED, defendant's renewed motion for summary judgment is GRANTED and the Complaint is DISMISSED.

/s/ George La Plata
George La Plata
U.S. District Judge

July 31, 1991
Ann Arbor, MI

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE,

Defendant.
_____/

C.A. No. 90-CV-60045-AA

HON. GEORGE La PLATA

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff Brian Dickerson brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 *et seq.*, seeking to compel the production of records pertaining to the disappearance and presumed murder of James Riddle Hoffa. The defendant Department of Justice claimed exemption from disclosure under §522(b)(7)(A) [sic], which exempts records compiled for law enforcement purposes to the extent that production could "reasonably be expected to interfere with enforcement proceedings." On July 31, 1991, the Court granted defendant's Renewed Motion for Summary Judgment and dismissed the Complaint. On August 14, 1991, plaintiff filed the pending motion for reconsideration.

The Local Rules of the Eastern District of Michigan provide that in order to prevail on a motion for reconsideration, the moving party "shall not only demonstrate

a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof." L.R. 7.1(h)(3) (formerly Local Rule 17(m)(3)). Further, a motion which merely presents the same issues ruled upon by the Court, either expressly or by implication, shall not be granted. Plaintiff seeks reconsideration arguing that it was error not to have ordered the production of a *Vaughn* Index, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), or *in camera* review of certain documents selected by plaintiff.

The Court denied the parties' earlier cross-motions for summary judgment, finding there was an issue of fact whether the prospect of law enforcement proceedings had been abandoned or were no more than merely "conceivable." Defendant then filed the renewed motion for summary judgment with an additional affidavit from William Baker, Assistant Director of the FBI in charge of the Criminal Investigative Division. In response, plaintiff argued that the Court should order defendant to produce a *Vaughn* Index or require *in camera* review of certain categories of documents. Noting that the three affidavits taken in combination might be sufficient to meet defendant's burden, the Court nevertheless decided to go beyond the affidavits because of the length of time since Hoffa's disappearance and comments questioning whether charges would ever be brought. The Court ordered defendant to submit records contained in the "Moody File" for *in camera* inspection. The "Moody File" represents records compiled in order for Agent Moody to prepare his affidavit. The Court concluded from the affidavits and the "Moody File" that defendant had met its burden of establishing that the records are exempt under

§522(b)(7)(A) [sic]. *Bevis v. Dept. of State*, 801 F.2d 1386 (D.C. Cir. 1986), *Alyeska Pipeline Service v. U.S. EPA*, 856 F.2d 309, 313 (D.C. Cir. 1988).

As plaintiff argues, a number of cases have indicated that *in camera* review is not favored or necessary in evaluating claimed exemptions under FOIA. See, *Ingle v. Dept. of Justice*, 698 F.2d 259 (6th Cir. 1983), and *Vaughn v. United States*, 936 F.2d 862 (6th Cir. 1991). At the same time, it is clearly within a court's discretion to order *in camera* review. *Vaughn*, 936 F.2d at 868. In fact, not only is a court free to take various types of evidence, the Sixth Circuit has held that a court is not required to follow any particular course in making its independent reasoned judgment regarding the claimed exceptions. *Vaughn*, 936 F.2d at 869.

Finally, plaintiff's reliance on the recent Eighth Circuit decision denying the government's application for writ of mandamus in *In re Dept. of Justice*, 950 F.2d 530 (8th Cir. 1991), is misplaced. First, the question in that case actually was whether the district court had the power and authority to order the government to prepare a *Vaughn* Index. Second, on February 12, 1992, the Eighth Circuit granted rehearing *en banc* and vacated its previous opinion, 950 F.2d at 538.

Because the Court was not required to order a *Vaughn* Index or to only order *in camera* review of documents selected by plaintiff, plaintiff has failed to establish a palpable defect by which the Court and parties have been misled or that a different disposition must result from

correction thereof. Therefore, plaintiff's motion for reconsideration is DENIED.

/s/ George La Plata
George La Plata
U. S. District Judge

March 13, 1992
Ann Arbor, MI

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	Civil Action Number 90-CV-60045-AA

DECLARATION OF ANGUS B. LLEWELLYN

I, Angus B. Llewellyn, hereby declare as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Section of the Records Management Division at FBI Headquarters (FBIHQ), Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures used by the FBI to respond to public requests for agency records pursuant to the Freedom of Information Act (FOIA), Title 5, United States Code (U.S.C.), Section 552. I am personally familiar with the procedures followed in processing the plaintiff's FOIA request.

(3) The purpose of this declaration is to: (a) set forth the pertinent correspondence related to the plaintiff's FOIA request; (b) explain the FBI's Central Records System; (c) identify records found in the Detroit Field Office and FBIHQ which are responsive to the plaintiff's FOIA request; and (d) explain the handling of the plaintiff's FOIA request and justify the propriety of the FOIA exemption claimed by the FBI.

I. CORRESPONDENCE PERTAINING TO THE PLAINTIFF'S FOIA REQUESTS TO THE DETROIT FIELD OFFICE AND FBIHQ

(4) The following is a descriptive chronology of correspondence relative to plaintiff's FOIA request. True copies are attached hereto as Exhibit I, and designated A through G.

(A) Letter from Mr. Herschel P. Fink, attorney for the Detroit Free Press (plaintiff's attorney), addressed to the Detroit, Michigan, Field Division (FBI, Detroit), dated July 25, 1989, making an FOIA request on behalf of his client for 15 categories of documents and information related to the FBI's investigation into the disappearance of James Riddle Hoffa on July 30, 1975.

(B) Identical letter, *supra*, paragraph (4)(A), dated July 25, 1989, addressed to the FOIPA Section, FBIHQ, Washington, D.C.

(C) Letter from FBI, Detroit to plaintiff's attorney, dated August 4, 1989, advising that an investigative file responsive to his FOIA request to FBI, Detroit is being withheld in its entirety pursuant to Title 5, U.S.C., Section

552, subsection (b)(7)(A). This letter also advised of administrative appeal rights.

(D) Letter from the FOIPA Section, FBIHQ, to plaintiff's attorney, dated August 22, 1989, advising that documents responsive to his FOIA request to FBIHQ are being withheld in their entirety pursuant to Title 5, U.S.C., Section 552, subsection (b)(7)(A), and of his administrative appeal rights.

(E) Letter from plaintiff's attorney to the Office of Legal Policy – Information and Privacy, United States Department of Justice (DOJ), Washington, D.C., dated September 1, 1989, containing the plaintiff's administrative appeal of the actions of FBI, Detroit and FBIHQ concerning his FOIA request.

(F) Letter from DOJ to plaintiff's attorney, dated October 31, 1989, affirming FBIHQ's denial of responsive documents to plaintiff pursuant to Title 5, U.S.C., Section 552, subsection (b)(7)(A), and advising the plaintiff of his right to seek judicial review.

(G) Letter from DOJ to plaintiff's attorney, dated November 30, 1989, affirming FBI, Detroit's denial of responsive documents to plaintiff pursuant to Title 5, U.S.C., Section 552, subsection (b)(7)(A), and advising the plaintiff of his right to seek judicial review.

II. IDENTIFICATION OF RECORDS PERTAINING TO THE ABDUCTION OF JAMES R. HOFFA

EXPLANATION OF THE FBIHQ CENTRAL RECORDS SYSTEM

(5) The FBI's Central Records System is the primary records system of the FBI and contains administrative, applicant, personnel, general and investigative files compiled for law enforcement purposes. The Central Records System consists of a numerical sequence for classifying files broken down according to subject matter. The subject matter of the file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter. The FBI's Central Records System is accessible through the FBI's General Indices, which consists of index cards on various subject matters arranged in alphabetical order. The index cards fall into two general categories, "main" index cards and "cross" or "see" index cards. A "main" index card carries the name of an individual, organization, activity, etc., which is the subject of a file contained in the records system. A "cross" or a "see" index card contains the name of an individual, organization, event, activity, or the like which is mentioned in a file of which some other individual, organization, event, activity, or the like is the subject of an investigation. A "main" card is automatically prepared at the time the FBI becomes involved in the investigation of a possible violation of Federal law within its investigative jurisdiction. At that time, the names of known subjects, suspects or victims are set forth in the case caption and subsequently indexed. The decision to further index the names of additional subjects and/or other names or

information appearing in a document is made by the investigative SA at FBIHQ.

(6) Currently, the FBI is in the process of compiling an automated indices. Information that would have been placed on "main" or "see" cards is now "main" and "see" entries placed in the computer. These entries are retrieved in the same manner as the hard card, by the name of an individual, organization, activity, etc.

FBI FIELD OFFICE CENTRAL RECORDS SYSTEM

(7) Access to the Central Records System maintained in an FBI Field Office is afforded by the Field Office's General Indices, similar to the General Indices at FBIHQ. The Indices consist of index cards on various subjects, including names of individuals. Again, the decision to index is made by the investigating Agent and the supervising Agent, except for the name(s) of subject(s), suspect(s) or victim(s) carried in the case caption, which are automatically indexed. The records system contains administrative, applicant, personnel, general and investigative files compiled for law enforcement purposes. Files in this records system are assigned classification numbers according to subject matter. This system consists of a numerical sequence for classifying of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication or foreign intelligence matter. The index cards in the General Indices fall into two general categories: "main" index cards and "see" index cards (i.e., cross references). A "main" card carries the names of an individual, organization, activity, etc., that is not the main

subject of the identified file, but rather is simply mentioned somewhere in the file.

RECORDS SYSTEM AUTHORITY

(8) Authority for the maintenance of these systems is the Federal Records Act of 1950, (44 U.S.C. Section 3101; *see also* 41 C.F.R. Section 101-11.202), which requires Federal agencies to ensure that adequate and proper records are maintained in order to document their organization, functions, policies, decisions, procedures and transactions, and to protect the legal and financial rights of the Federal Government.

RESPONSE TO PLAINTIFF'S REQUEST

(9) In response to plaintiff's request, a search of the General Indices to FBIHQ Central Records System revealed that information responsive to plaintiff's request is located in FBIHQ file 9-60052, which contains material pertaining to the disappearance and possible abduction of James Riddle Hoffa. This is a voluminous file (67 volumes). This file was opened on July 31, 1975.

(10) A search of the Detroit Field Office Central Records System revealed that information pertaining to the disappearance of James Riddle Hoffa is located in Detroit file 79-359 (Missing Person Investigation) which was changed to Detroit file 183A-1155, Racketeer Influenced and Corrupt Organization – La Cosa Nostra (RICO-LCN, Labor Racketeering Investigation). This is also a voluminous file (332 volumes). The FBIHQ files and the Detroit Office files were compiled for law enforcement

purposes pursuant to Title 18, Chapter 96; and Title 18, U.S.C., Section 876.

(11) This is still a pending investigation. The file contains the results of extensive investigation into Hoffa's disappearance, including documents which contain the results of interviews with numerous individuals, information provided by confidential sources, reports on the location and viability of potential evidence, background information on suspects and materials which detail the procedures followed by the FBI in conducting this investigation. To date, no suspects have been charged in connection with this crime. This matter continues to be actively pursued.

(12) The documents contained in this file are categorized as follows:

Documents setting forth leads to be conducted.

Documents containing information received from confidential informants.

Information and documents provided by local law enforcement.

Interviews of third parties and cooperating witnesses.

Public source information such as newspaper clippings and press releases.

Public and sealed court documents.

Laboratory reports setting forth results of examination.

Polygraph worksheets and reports.

III. JUSTIFICATION FOR DENIAL OF RECORDS RESPONSIVE TO FOIA REQUEST OF PLAINTIFF

(13) Title 5, U.S.C., Section 552, subsection (b)(7)(A), provides for the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.

(14) As stated previously, the investigation into the disappearance of James R. Hoffa, although instituted in 1975, continues to be actively pursued. To date, no charges have been filed against any suspect; however, with investigation continually ongoing, new information, combined with facts already uncovered, could result in prosecution of person(s) responsible for this crime. If the records plaintiff has requested were released, they could seriously impair any future enforcement proceedings by disclosing evidence developed to date, the evidence the Government is still developing, and the direction and scope of the ongoing investigative efforts.

(15) Release of such record would reveal to the public, including the perpetrator(s) of the crime, the information known to the FBI, the investigative leads the FBI is pursuing, the individuals the FBI considers prime suspects in the investigation and the nature of the evidence the FBI has gathered to date. Armed with such knowledge, the perpetrator(s) of the crime could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi to counter the evidence should it be introduced against them at a future criminal proceeding.

(16) Also, release of material from the Detroit Field Office and/or FBIHQ files could adversely impact upon possible state and/or local proceedings concerning matters emanating from the FBI's investigative efforts to determine the whereabouts of James Hoffa.

(17) It should be noted at this time that the documents at issue contain information that is or may be independently exempt from disclosure pursuant to other subsections of Title 5, U.S.C., Section 552, including but not limited to (b)(7)(C); (b)(7)(D) and (b)(7)(E).

FOIA EXEMPTION (b)(7)(C)

(18) Title 5, U.S.C., Section 552, subsection (b)(7)(C), provides for the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy. In this instance, the mere acknowledgement of the existence of records wherein the name of a third party is mentioned, if such records exist, will constitute an unwarranted invasion of privacy.

(19) The (b)(7)(C) exemption would be asserted in documents in order to protect the (a) identity and privacy of special Agents and clerical employees of the FBI; (b) identities of third parties interviewed in the course of any investigation and personal information about such third parties; (c) identities of other Federal Government agencies' and other law enforcement agencies' employees who

have assisted the FBI in its investigation into the disappearance of James R. Hoffa; and (d) identities and identifying data of individuals who were mentioned during the course of interviews, contacts with other third parties, or contact with the FBI.

(20) During the course of FBI investigations, information is often developed and recorded concerning individuals other than the person who is the subject or focal point of the investigation. An example of such a person would be an individual known to be an associate or acquaintance of the subject of a particular investigation. Such an associate may be of investigative interest to the FBI as a possible suspect in an unsolved criminal matter, a potential witness to criminal activity, or as a source of information regarding the whereabouts or activities of the subject of the investigation. They may also be of interest to the FBI because of a previous criminal record, past criminal activity, or their known association with the subject of the investigation. Frequently, a considerable amount of background information is compiled regarding such individuals.

(21) The FBI has a responsibility to protect the privacy rights of individuals who are mentioned or discussed in its files. In accordance with the Privacy Act of 1974, the FBI cannot disseminate information gathered during the course of an investigation to persons not legally entitled to receive such information. Furthermore, to release to the plaintiff personal or biographical information about third parties appearing in our files often would reveal that those persons were of interest to the

FBI or they were in some way connected with the investigation. This would be an unwarranted invasion of personal privacy, as the release of their identities to the public could expose them to unnecessary public attention, questioning, harassment, criticism and intrusion into their private lives without any judicial safeguards. Because the FBI has no means of controlling the use made of information released pursuant to a FOIA request, once such rights are breached by disclosure they are lost forever.

(22) Exemption (b)(7)(C) has traditionally been used by the FBI in conjunction with (b)(7)(D), see paragraph 24, *infra*, to withhold the identities of persons who were, for whatever reason, in a position to furnish information concerning an FBI investigation. If the identities of these persons were released, it could reasonably be expected to constitute an unwarranted invasion of personal privacy, because it might subject them to unnecessary public attention, harassment, or criticism, and their future cooperation would undoubtedly be inhibited.

(23) In making a determination whether to release the identities of third parties who have furnished information to the FBI, the public interest in disclosure, if any, is balanced against the invasion of the individual's personal privacy.

FOIA EXEMPTION (b)(7)(D)

(24) Title 5, U.S.C., Section 552, subsection (b)(7)(D), provides for the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement

records or information could reasonably be expected to disclose the identity of a confidential source, . . . , and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . , information furnished by a confidential source.

(25) The privacy of persons interviewed has been traditionally protected by the FBI on the basis that the information was received confidentially. Under the FOIA, these considerations are stated in two separate exemptions, i.e., (b)(7)(C), see paragraph *18, supra,* and (b)(7)(D); however, they are not mutually exclusive. When Agents of the FBI conduct interviews, they seek information concerning individuals or other matters within the investigative jurisdiction of the FBI. Persons interviewed often assume, quite logically, that the information they furnish is for the assistance of the FBI only in the fulfillment of its responsibilities, and that their identities and the fact of their cooperation with the FBI will not be publicly exposed. Exposure of the identity of cooperating individuals, or information provided by such persons, may well lead to physical harm to the person acting as a source of information.

(26) Persons providing information, including witnesses to a crime, who may expect to be called upon at a later time to testify in public at a judicial proceeding, should be secure in the knowledge that, absent the necessity of such public testimony with its attendant judicial restraints and protections, their assistance rendered the Government will be held in confidence and will not be violated. The fear of such exposure often inhibits the

cooperation of otherwise conscientious citizens. This consideration is also recognized under the FOIA statute, which exempts material from confidential sources and reinforces their right to privacy. Significantly, protection by exemption from disclosure is afforded by the statute to all of the information furnished by the confidential source, as well as the actual identity of the source. To disclose the identity of a person interviewed under such circumstances would be more than an unwarranted invasion of personal privacy; it would breach the confidentiality under which the person was interviewed.

FOIA EXEMPTION (b)(7)(E)

(27) Title 5, U.S.C., Section 552, subsection (b)(7)(E), provides for the withholding of information or records compiled for law enforcement purposes to the extent that the production of such records would disclose an investigative technique. To release a lawful technique, which continues to be used successfully, would result in the subjects of FBI investigations taking additional steps to circumvent detection. Included in the concept of a "technique" are procedures used to achieve a particular or unique investigative goal. It is conceded that the individual elements of certain procedures are basic and commonly known; however, their use in concert with other elements of investigation and in their totality directed toward a specific investigative goal constitutes a "technique" which merits protection to insure its future effectiveness. Specific description of theses techniques and procedures, or release of unique information attainable only through the use of the technique, would disclose the

technique and thus negate the effectiveness of the exemption.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 17th, 1990.

/s/ Angus B. Llewellyn
Angus B. Llewellyn
Special Agent
Federal Bureau of
Investigation
Washington, D. C.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	CIVIL ACTION NUMBER 90-CV-60045-AA

DECLARATION OF JIM E. MOODY

I, Jim E. Moody, hereby declare as follows:

(1) I have been a Special Agent of the Federal Bureau of Investigation (FBI) for 19 years and am currently assigned as the Chief of the Organized Crime Section of the Criminal Investigative Division at FBI Headquarters (FBIHQ), Washington, D.C.

(2) My official responsibilities include the overall supervision, management and direction of the FBI's extensive and varied investigative efforts designed to thwart the activities of Organized Crime. Due to the nature of my official duties, I am familiar with the FBI's pending investigation into the disappearance of James R. Hoffa on July 30, 1975. I am concerned that the plaintiff's request, pursuant to the provisions of Title 5, United

States Code (U.S.C.), Section 552, commonly known as the Freedom of Information Act (FOIA), for access to FBI records detailing our investigative efforts regarding Mr. Hoffa's disappearance, will result in a public disclosure of information that will impede our efforts to solve the mystery of Mr. Hoffa's disappearance and bring the perpetrators of any crimes to justice.

(3) The FBI's investigation into Mr. Hoffa's disappearance is pending and ongoing. The case is not "closed." We are continuing our efforts to develop evidence which can be utilized in criminal proceedings concerning individuals believed to be involved in Mr. Hoffa's disappearance as well as other criminal activities. The files responsive to plaintiff's FOIA request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation. Public revelation of such information would enable the perpetrators of the crime to learn the extent of the concrete information the FBI has in its possession and the thrust of our investigative efforts, thereby enabling them to thwart those efforts by planting false leads, intimidating witnesses, and fabricating alibis. In addition, the documents located in the voluminous file regarding this investigation contain information which may be utilized in a myriad of other

possible criminal proceedings at the Federal, state and local levels.

(4) My experience has taught me that the conduct of investigations impacting upon the activities of Organized Crime requires hard work over long periods of time; imaginative use of investigative techniques; patient, tireless efforts to determine the identities of individuals who may possess information concerning a particular crime and even more patient efforts to gain the confidence of such individuals so that we can elicit the information so critical to the successful conclusion of a criminal investigation; and the ability to truthfully and convincingly assure all those who cooperate with us that the fact of their cooperation will not be indiscriminately made known to the public. The FBI has pursued its investigation of Mr. Hoffa's disappearance for 15 years and intends to continue to pursue certain theories and strategies to bring the facts to light in this case, with a view toward eventual criminal proceedings. Public revelation of the information in our files would seriously impede these efforts, not only for the reasons mentioned earlier, but also because such an action would be misread by individuals potentially possessing critical information to mean that the government has ceased its efforts to solve this case and, therefore, there is no need for them to come forward.

(5) Another important issue, particularly with homicide type cases, pertains to the necessity for the Government to protect that information which is needed for later corroboration of witnesses and suspects alike. This situation mandates continued confidential handling

of accumulated information so as not to risk compromising that which will be needed to help verify the validity of future witnesses, and/or to corroborate any future cooperation by conspirators, in order to prove the applicable violations. As a pending investigation, the Government is not in a position to determine what information will fulfill these requirements, and therefore must protect as much as it can for future tactical use.

(6) Accordingly, I am of the opinion that release of the information contained in our investigative files concerning Mr. Hoffa's disappearance "could reasonably be expected to interfere" with the investigation within the meaning of Exemption (b)(7)(A) of the FOIA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 1990.

/s/ Jim E. Moody
JIM E. MOODY
Special Agent
Federal Bureau of
Investigation
Washington, D.C.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DICKERSON, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	No. 90-CV-60045-AA

DECLARATION OF WILLIAM M. BAKER

I, William M. Baker, hereby declare as follows:

(1) I am the Assistant Director of the Federal Bureau of Investigation (FBI) in charge of the Criminal Investigative Division at FBI Headquarters Washington, D.C. For the two years prior to this assignment, I served as the Director of Public Affairs at the Central Intelligence Agency. Prior to that, I was the Assistant Director of the FBI in charge of the Office of Congressional and Public Affairs after having served approximately 19 years in various investigative capacities, including that of Special Agent in Charge of one of the FBI's field divisions. All told, I have been an FBI Special Agent for 25 years.

(2) In my official capacity as FBI Assistant Director in charge of the Criminal Investigative Division, I am responsible for the formulation of an overall strategy

with regard to the FBI's efforts to fulfill its investigative responsibilities concerning federal criminal statutes and for providing overall direction in the conduct of the FBI's criminal investigations. My responsibilities entail determining which investigative matters should be given priority, whether resources should continue to be expended on particular investigations or would be more effectively utilized elsewhere, and conducting the cost-benefit evaluation essential to determining whether an investigative effort should continue. I am responsible for directing the activities of the Special Agents in Charge of the FBI's various field divisions and for ensuring that nationwide criminal investigative activities are conducted in a coherent, consistent manner. My duties also include ensuring that the Director of the FBI is kept personally informed of the status of the FBI's most significant criminal investigations.

(3) The Criminal Investigative Division has overall responsibility for the conduct of all criminal investigations, including the investigation into the abduction and presumed murder of Jimmy Hoffa. Therefore, as FBI Assistant Director in charge of the Criminal Investigative Division, I have overall supervisory authority for the investigation into the disappearance of Jimmy Hoffa.

(4) The purpose of this declaration is to apprise the Court of the significance the FBI attaches to its ongoing investigation into the disappearance of Jimmy Hoffa; and to demonstrate that the FBI's investigation could result in enforcement proceedings against the person(s) responsible for the abduction and presumed murder of Jimmy Hoffa.

(5) This declaration is based upon information that I obtained in the course of my official duties.

(6) Since Mr. Hoffa's disappearance on July 30, 1975, the FBI has conducted an intensive, nationwide investigation. The investigation is ongoing and still absorbs FBI management and field agent resources on a regular basis.

(7) It is my responsibility to determine whether the investigation into Mr. Hoffa's disappearance should be pursued, and, if so, what FBI resources should be devoted to it. It is my judgment that the investigation into Mr. Hoffa's disappearance warrants the continued efforts of the FBI. Moreover, I have allocated continued FBI resources to the Hoffa investigation.

(8) Based upon my knowledge of the investigation into Mr. Hoffa's disappearance, I believe that the person(s) responsible for Mr. Hoffa's abduction and presumed murder could be brought to justice. My decision to allocate FBI resources to the Hoffa investigation rests, in part, on my belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted. I would not knowingly permit scarce FBI resources to be devoted to a futile investigation.

(9) Public disclosure of the information contained in the Hoffa file, either by release of the Hoffa file itself, or through testimony or discovery from FBI personnel with knowledge of the file, could reasonably be expected to interfere with enforcement proceedings against those person(s) responsible for Mr. Hoffa's disappearance. The vast majority of information in the file emanates from informants and sources knowledgeable about organized

crime, and not from public records. The person(s) responsible for Mr. Hoffa's disappearance, as well as those persons in a position to furnish information regarding this case, are either secretive by their very nature or fear the consequences of public disclosure that they have furnished information to the FBI or are in a position to furnish such information.

(10) Disclosure of the information in the Hoffa file would hinder the FBI's efforts to bring to justice those person(s) responsible for Mr. Hoffa's disappearance. For example, disclosure could permit the person(s) responsible for Mr. Hoffa's disappearance to deduce the FBI's current knowledge regarding Mr. Hoffa's disappearance. In addition, it could suggest to those individuals in a position to help the FBI solve the case that the FBI could not preserve the confidentiality of their assistance and thus, would lead them to conclude that it would not be safe to come forward. Furthermore, the release of the information could enable the person(s) responsible for Mr. Hoffa's disappearance and others to mislead the FBI and thereby obstruct the investigation.

(11) Documents contained in the Hoffa file pertain not only to the investigation of Mr. Hoffa's disappearance, but also to other active criminal investigations into organized crime activities. Therefore, public disclosure of the Hoffa file could reasonably be expected to interfere with enforcement proceedings in addition to those against the person(s) responsible for Mr. Hoffa's disappearance.

(12) I am aware of the June 1989 statement of former FBI Special Agent Kenneth P. Walton, quoted at page

4 of the Court's order dated January 10, 1991, concerning the prospect of enforcement proceedings against the person(s) responsible for Mr. Hoffa's abduction and presumed murder. Mr. Walton's statement did not reflect and does not reflect official FBI policy.

(13) As FBI Assistant Director in charge of the Criminal Investigative Division, I have authority to determine and state the FBI's position concerning the prospect of enforcement proceedings against the person(s) responsible for Mr. Hoffa's abduction and presumed murder.

(14) In determining the likelihood of enforcement proceedings against those person(s) responsible for Mr. Hoffa's disappearance, and thus whether FBI resources should continue to be expended on the investigation, the FBI is aware that fifteen years have passed since Mr. Hoffa's disappearance. However, FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. In fact, with the passage of time persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31st day of January, 1991.

/s/ William M. Baker
WILLIAM M. BAKER
Assistant Director
Criminal Investigative
Division Federal Bureau
of Investigation
Washington, D.C.

APPENDIX I

June 19, 1989 Detroit Free Press, Page 6A

HOFFA'S SON SAYS FBI SHOULD TELL FAMILY THE FACTS

BIRMINGHAM – James Hoffa, the son of former Teamsters union leader Jimmy Hoffa, said Sunday if the FBI knows who killed his father then the agency should tell he [sic] family, even if the case can't be prosecuted.

His comments Sunday came in response to published remarks by Ken Walton, who ran the Detroit office of the FBI until last year. Walton was quoted as saying in the Detroit News that he knows who killed the former Teamsters president but can't do anything about it.

"I think it is incumbent upon the FBI, if in fact they do know who was involved in the slaying of my father, that they share that information with the family," Hoffa told the Free Press.

"Perhaps such knowledge would somehow ease the pain of the loss and the uncertainty surrounding my father's disappearance," he said. "I have always suspected they knew more than they were saying."

Walton, 49, who is leaving the FBI next month to work for an international investigative and security company in New York, said: "I'm comfortable I know who did it, but it's never going to be prosecuted because . . . we would have to divulge informants, confidential sources."

He said more than one person was involved in Hoffa's death. Hoffa disappeared from a suburban Detroit parking lot in June 1975.

June 18, 1989 Detroit News, Page 1 and 2B

'I know who (killed Hoffa), but it's never going to be prosecuted'

EX-FBI MAN TAKES SECRETS WITH HIM

WASHINGTON – Veteran agent Kenneth P. Walton is leaving the FBI convinced he knows who murdered Jimmy Hoffa – but convinced he can't do a thing about it.

"I'm comfortable I know who did it, but it's never going to be prosecuted because . . . we would have to divulge informants, confidential sources," said Walton, who headed the FBI in Detroit from 1985 to 1988.

Inside dirt on the Hoffa case isn't all Walton will take with him when he leaves next month after 24 years with the agency. He leaves with doubts about law enforcement's ability to crush the drug epidemic, regrets about not doing more to break the Detroit Mafia and concern that the U.S. Attorney's Office failed to get maximum public impact from the FBI's ongoing investigation of Detroit judicial corruption.

Walton is moving to New York to work for a international investigative and security firm. But he says he would love to be New York City's next police commissioner if buddy Rudolph W. Giuliani, a former U.S. attorney in Manhattan, beats Ed Koch and becomes mayor.

"With an Army of 29,000 sworn officers, (we could) do a lot of damage and a lot of good," Walton said.

Dressed in a navy blue suit, powder blue silk shirt and white tie – puffing on a cigarette as he spoke – Walton, 49, was his trademark dapper self during a recent farewell interview. He heads the FBI's national white-collar and public corruption unit from an office just blocks from the White House.

While known for show biz charisma and a thirst for the spotlight, Walton left an indelible mark on Detroit during his brief tenure.

He busted some big criminals and bickered with then-U.S. Attorney Roy C. Hayes about the court investigation and other law enforcement issues, federal sources said. Hayes eventually was credited with getting Walton transferred from Detroit to Washington in March 1988.

Among his agents, Walton played to mixed reviews.

To some, he was a tough, hard working, lawman. Others viewed him as a leader fixated on media attention and ego gratification.

As for the mystery of Hoffa's 1975 disappearance from a Bloomfield Township parking lot, Walton said, "There was more than one person who killed Jimmy Hoffa or was involved in the efforts. (But) we can't force a source for example, to testify, and . . . we go to extraordinary lengths to protect" confidential information.

"Some of the suspects are dead, some of the informants are dead," he said.

Although Walton declined to be specific, officials have long mentioned the late New Jersey Teamster leader and organized crime figure, Tony "Pro" Provenzano, as a key suspect.

Aside from the Hoffa case, Walton says he was frustrated that he couldn't do more to rein in the Detroit Mafia, which he described as "such a small, cohesive, interrelated group."

"The Detroit Cosa Nostra is kind of hybrid in the sense their major source of revenue is gambling and the money gained from gambling is used in their other efforts," he said.

Walton had more success in investigating Detroit's corrupt judges. From 1985 to 1988 he oversaw the investigation that has – to date – produced indictments of three judges for taking bribes to fix cases. The FBI investigated while the U.S. Attorney's Office supervised and prosecuted the cases.

Walton is critical of the way the U.S. Attorney's office handled the case. He insists federal prosecutors missed a much bigger public splash by indicting the judges individually instead of all at once.

Judge William A. Haley of Detroit's 36th District Court was the first to be indicted in December 1987. He pleaded guilty in June 1988. Recorder's Court Judge Evelyn K. Cooper, indicted in June 1988, pleaded guilty in March. The third, 36th District Judge Leon Jenkins, was indicted in September 1988, was acquitted of four bribery charges in March 1989 and still faces a racketeering charge.

The U.S. Attorney's Office in Detroit disagrees with Walton on the pace of indictments.

"We felt – we should prosecute each public official as soon as the FBI completed its investigation, said assistant U.S. Attorney Ross Parker, chief of the criminal division.

Then there's the issue of drugs.

Walton said the scope of the illegal drug trade in Metro Detroit and elsewhere struck him most when he discovered his son repeatedly had been approached by drug dealers at a suburban Detroit high school.

"When we went from New York to Detroit, my 16-year old son always wore a baseball cap – from the time he was 3 years old," Walton said. "They were always generic baseball caps – the New York Yankees, Washington Redskins, something like that.

"I lived in a rather affluent part of (suburban) Detroit, and in two weeks of us being there. I see him come home from school one day with a baseball cap on, and it says 'FBI' on it.

"I said, Why are you doing that?" He said, "There's so many dope dealers in my high school, that's the only way they'll leave me alone."

"Now if they're going to sell dope to my kid, they're going to sell it to anybody's kid."

Walton said he believed the FBI did have some impact on Detroit's drug problem.

"I think we interdicted a number of major suppliers, but it's kind of like emptying out the ocean with a teaspoon. There was just so much of it.

"My personal opinion is if we stopped all narcotics from coming into the country, we'd still have a major narcotics problem" because of dealers' ability to make their own drugs with chemicals, he said.

The solution?

"If there is a solution, it's probably going to be a woman with chalk on her dress," Walton said. "In my opinion the solution to the narcotics problem is education. And you have to make the use of narcotics unattractive."

During his stint in Detroit, the veteran agent said he shied away from investigating allegations about crooked Detroit police officers.

"My position was any allegation of police corruption barring extraordinary circumstances would be referred to the (Detroit police) department," he said. "During that period I was there – to my knowledge – there were no extraordinary circumstances."

Sitting behind his oversized desk, Walton said his motivation for leaving the FBI was fairly simple.

For one thing, he's eligible to retire. Plus, he said "I'm beat up and I'm tired and I'm burned out."

From Washington, he will go to New York to become vice-president and director of field operations of the Fairfax Group, a firm that specializes in management consulting, security and investigations.

Reflecting on his FBI career, he said he would have preferred to remain an agent instead of becoming a supervisor.

"In retrospect, I have not been a real good manager because I think too much like an agent," he said. "But I would say at the risk of making self serving declarations, I'm probably not a good manager, but I'm a hell of a leader."

APPENDIX J

Excerpts of Congressional Testimony of Oliver B. Revell before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs on "Organized Crime: 25 years after Valachi" on April 11, 1988

Senator Nunn: Thank you.

We will go to questions for all of our panel now.

Judge Sessions, I notice on page 6 of your statement you state, "The resulting intelligence not only identified the probable coconspirators responsible for the Hoffa disappearance, but identified LCN [La Cosa Nostra] influence and domination of some major international labor unions and numerous locals throughout the country."

On the question of the Hoffa disappearance, has the FBI established the reason for it? And have you established the conspirator or conspirators in that?

Judge Sessions: Senator, I am informed that there are a number of possible identifications of people involved in that, and the reasons generally for it being, as I understand it, that there was an expression shortly before his death that he intended to purge the organized crime families from the union activities in the Teamsters. But that is the information I have, sir.

Senator Nunn: Are we likely to get indictments in that area at some point?

Judge Sessions: I would not be prepared to comment on that. I will investigate that and do it for the record for you, sir.

Mr. Revell: The individuals that we believe are responsible are, I believe already incarcerated, but for other charges. It is doubtful at this point that we will ever have sufficient evidence to bring them to trial. But as I said, they have been convicted on other crimes.

Senator Nunn: In other words, you believe you have information that gives you sound reason to conclude that you have identified the perpetrators, but not sufficient information to bring indictments and criminal prosecution?

Mr. Revell: That is correct.

Supreme Court, U.S.
FILED
JAN 31 1994
OFFICE OF THE CLERK

No. 93-678

In the Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN DICKERSON, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT S. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the courts below properly held that there is no genuine issue of material fact concerning the applicability of Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A), to requested federal law enforcement records.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 992 F.2d 1426. The opinions of the district court (Pet. App. 35a-39a, 40a-46a, 47a-50a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1993. A petition for rehearing was denied on August 3, 1993. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on October 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for records of an investigation by the Federal Bureau of Investigation (FBI) into the disappearance of Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. Hoffa disappeared from Detroit in July 1975 and is widely thought to have been abducted and murdered. The FBI launched a nationwide investigation into Hoffa's disappearance. Pet. App. 1a-3a.

Materials relating to the Hoffa investigation are contained in two open investigatory files, one in FBI headquarters (FBIHQ) in Washington, D.C., and the other in the FBI Field Office in Detroit. Pet. App. 3a. The files responsive to petitioner's request contain

> documents detailing the FBI's theories regarding the case, investigative leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation.

Id. at 66a. As of May 1990, the files consisted of 67 volumes in the FBIHQ and 332 volumes in the Detroit Field Office. *Id.* at 56a-57a.

In July 1989, petitioner submitted an FOIA request relating to the FBI's investigation into Hoffa's disap-

pearance. C.A. App. 15-23. Petitioner's request covered 15 categories of documents, including eyewitness accounts or reports thereof, witness statements, scientific tests, inventories of items seized pursuant to search warrants, transcripts of any electronic surveillance intercepts, and "[a]ll writings concluding, finding, speculating or otherwise referring to what happened to James Riddle Hoffa." *Id.* at 15-16.

Respondent denied the FOIA requests in August 1989 under Exemption 7(A), which exempts records compiled for law enforcement purposes when disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A); see C.A. App. 51-53. The Office of Information and Privacy in the Department of Justice affirmed the initial administrative denial of petitioner's request, but offered to make available all "public source" materials. *Id.* at 56-57.

2. a. In February 1990, petitioner filed this action against respondent under 5 U.S.C. 552(a)(4)(B), seeking to compel disclosure of the withheld documents. Petitioner contested the reliance by respondent Department of Justice on Exemption 7(A), alleging (1) that there was no concrete prospect of future enforcement proceedings relating to Hoffa's disappearance, and (2) that release of the requested documents could not reasonably be expected to interfere with any such investigation in any event. C.A. App. 13.

Petitioner and respondent filed cross-motions for summary judgment. In support of its summary judgment motion, respondent presented a declaration by Special Agent Jim E. Moody, the Chief of the Organized Crime Section of the FBI's Criminal Investigative Division. Pet. App. 65a-68a. In response to

petitioner's claim that future enforcement proceedings were no longer a realistic prospect, Moody explained that "[t]he FBI's investigation into Mr. Hoffa's disappearance is pending and ongoing," that "[w]e are continuing our efforts to develop evidence which can be utilized in criminal proceedings concerning individuals believed to be involved in Mr. Hoffa's disappearance," and that the FBI "intends to continue to pursue certain theories and strategies * * * with a view toward eventual criminal proceedings." *Id.* at 66a-67a. Moody explained that investigations of organized crime activities require "hard work over long periods of time" and call for "patient, tireless efforts to determine the identities of individuals who may possess information concerning a particular crime and even more patient efforts to gain the confidence of such individuals." *Id.* at 67a.

Moody also addressed the potential impact of disclosure on future enforcement proceedings. He explained that disclosure of the kind of information requested by petitioner would allow those responsible for Hoffa's disappearance "to learn the extent of the concrete information the FBI has in its possession and the thrust of our investigative efforts." Pet. App. 66a. The perpetrators could then use that information to frustrate the FBI's investigative efforts "by planting false leads, intimidating witnesses, and fabricating alibis." *Ibid.* Disclosure of the information, Moody explained, also would threaten the FBI's ability to corroborate statements by witnesses and suspects, a process requiring maintenance of the confidentiality of existing evidence. *Id.* at 67a-68a.

Respondent also submitted the declaration of Special Agent Angus B. Llewellyn, a supervisor of

the Freedom of Information-Privacy Acts Section of the FBIHQ Records Management Division. Pet. App. 51a-64a. Llewellyn, who was personally familiar with the FBI's handling of petitioner's FOIA requests, stated that the files contain the following eight categories of records (*id.* at 57a):

[1] Documents ~~describing leads~~ Setting Forth to be conducted.

[2] Documents containing information received from confidential informants.

[3] Information and documents provided by local law enforcement.

[4] Interviews of third parties and cooperating witnesses.

[5] Public source information such as newspaper clippings and press releases.

[6] Public and sealed court documents.

[7] Laboratory reports setting forth [the] results of examination.

[8] Polygraph worksheets and reports.

Llewellyn also corroborated Moody's statements regarding the impact of disclosure on future enforcement proceedings. Pet. App. 58a. He added that disclosure could interfere not only with federal enforcement proceedings, but also with "possible state and/or local proceedings concerning matters emanating from the FBI's investigative efforts." *Id.* at 59a.

b. The district court initially denied the cross-motions for summary judgment. Pet. App. 35a-39a. The court determined that, on the record before it, a genuine issue of material fact existed with respect to the likelihood of future enforcement proceedings. *Ibid.*

Respondent renewed its motion for summary judgment after submitting the declaration of William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division. Pet. App. 6a. Baker was directly responsible for directing the conduct of the FBI's criminal investigations and had overall supervisory authority for the investigation into Hoffa's disappearance. *Id.* at 69a-70a. Baker's responsibilities included the determination of whether the Hoffa investigation should be pursued and what FBI resources should be devoted to it. *Id.* at 71a. Baker informed the court that the investigation "still absorbs FBI management and field agent resources on a regular basis," and that he was still allocating resources to it. *Ibid.* Baker further explained that "[i]t is my judgment that the investigation * * * warrants the continued efforts of the FBI," and he based his decision, "in part, on [the] belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted." *Ibid.*

Acknowledging that 15 years had then passed since Hoffa's disappearance, Baker explained that FBI criminal investigations "often result in enforcement proceedings many years after the crimes were committed." Pet. App. 73a. He added that "with the passage of time persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." *Ibid.*

In connection with respondent's renewed motion for summary judgment, the district court ordered respondent to submit various documents collected from the Detroit Field Office in order to enable Moody to prepare for a possible deposition. Pet. App. 8a-9a. The court then reviewed the so-called "Moody file" in camera. *Id.* at 9a.

In July 1991, after reviewing the Moody file and the Baker declaration, the district court granted respondent's motion for summary judgment. Pet. App. 40a-46a. Noting that the Baker declaration was "much more specific" about the FBI's ongoing investigation of Hoffa's disappearance, the court concluded that that declaration, "in combination with the earlier affidavits, may be sufficient to establish that the records could reasonably be expected to interfere with a prospective law enforcement proceeding." *Id.* at 43a. In addition, after conducting "a careful and thorough review" of "each and every document" in the Moody file, the court was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." *Id.* at 44a.

The district court turned next to the question whether the release of the requested documents could reasonably be expected to interfere with such proceedings. The court noted that "[t]he FBI need not justify [invocation of Exemption 7(A)] on a document-by-document basis, but may group the documents into distinct functional categories and show how the release of each category would likely interfere with the enforcement proceeding." Pet. App. 44a-45a. The court concluded that the categories

identified in Special Agent Llewellyn's declaration were "proper functional categories," and that "the affidavits of Agents Llewellyn and Moody [specify] how disclosure could reasonably be expected to interfere with the prospective law enforcement proceedings and hinder the efforts to bring those responsible to justice." *Id.* at 45a.

3. The court of appeals affirmed. Pet. App. 1a-32a. It first held that the district court did not err in refusing to order a document-by-document index. *Id.* at 10a-14a. It next sustained the district court's reliance on the Moody file, emphasizing that the documents had not been selected for the purpose of allowing the court to conduct in camera review, but had been prepared to brief Special Agent Moody on the status of the investigation. The court of appeals explained that the district court had reviewed the Moody file on its own initiative and had reasonably concluded that it sufficiently corroborated the government's position. *Id.* at 13a-14a.

Based on its review of the government's declarations and the Moody file, the court of appeals also held that the record supports the finding that the investigation into Hoffa's disappearance is ongoing. The court noted, in particular, that Assistant Director Baker, who is responsible for determining whether to pursue an investigation, stated that he is continuing to allocate investigative resources to the Hoffa case. Pet. App. 15a-16a.

Finally, the court of appeals sustained the district court's determination that production of the records could reasonably be expected to interfere with the continuing investigation. Pet. App. 16a-18a. In the court of appeals' view, the district court's finding on

that issue was supported by the Moody and Llewellyn declarations, which establish that disclosure of the records in this ongoing racketeering investigation could result in destruction of evidence and tampering with witnesses. *Id.* at 16a-17a. The court also concluded that disclosure could interfere both with the corroboration of evidence in the Hoffa case and with the investigations in other pending and prospective criminal proceedings. *Id.* at 17a-18a.[1]

ARGUMENT

The decision of the court of appeals involves the application of settled principles under FOIA Exemption 7(A) to the facts of a particular criminal investigation. The court's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Exemption 7(A) of the FOIA authorizes an agency to withhold "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). This Court has recognized that unlike certain other FOIA exemptions, which "seem to require a showing that the factors made relevant by

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[1] Judge Beckwith wrote a concurring opinion indicating that the government could also have justified its decision to withhold the records under other FOIA exemptions. Pet. App. 19a-21a. Judge Batchelder dissented in part. She agreed with the court's finding that future enforcement proceedings were likely, but she disagreed with the majority in other respects. *Id.* at 21a-32a.

the statute are present in each distinct situation," the language of Exemption 7(A) "appears to contemplate that certain generic determinations might be made." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-224 (1978). In light of the purposes underlying that exemption, moreover, this Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236.[2]

Petitioner contends (Pet. 14-18) that the court of appeals erred in determining that future enforcement proceedings were likely in the Hoffa case. The court of appeals held that Exemption 7(A) is available when there is "at least 'a reasonable chance that an enforcement proceeding will occur.'" Pet. App. 10a (quoting *Nevas* v. *Department of Justice*, 789 F. Supp.

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[2] When this Court decided *Robbins Tire*, Exemption 7(A) shielded law enforcement records whose disclosure "*would* * * * interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1982) (emphasis added). In 1986, Congress amended Exemption 7(A) to require the government to show only that disclosure "*could reasonably be expected to* interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1988) (emphasis added). That change "represents a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7].'" *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). The withholding at issue in this case is therefore governed by a more generous standard than the one in place when the decision in *Robbins Tire* was issued.

445, 448 (D.D.C. 1992), vacated on other grounds *sub nom. Mapother* v. *Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993)). Applying that standard, the court affirmed the district court's determination that the record established a "reasonable prospect" (Pet. App. 16a) of future enforcement proceedings.

Petitioner does not contest the legal standard employed by the court of appeals. See Pet. 16-17 (relying on *Nevas*, 789 F. Supp. at 448). Rather, he objects to the court's application of that standard to the facts of this case, arguing that the record establishes a genuine issue of material fact concerning the likelihood of future enforcement proceedings. That narrow, case-specific question, however, does not warrant this Court's review. Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (declining to review finding of fact concurred in by court of appeals and district court); *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984) (same).

In any case, the conclusion concurred in by the courts below is supported by the record. Special Agent Moody, Chief of the FBI's Organized Crime Section, declared under oath that the FBI is "continuing [its] efforts to develop evidence which can be utilized in criminal proceedings concerning individuals believed to be involved in Mr. Hoffa's disappearance," and that the FBI "intends to continue to pursue certain theories and strategies * * * with a view toward eventual criminal proceedings." Pet. App. 66a-67a. Moody's statements are corroborated by the declaration of Assistant Director Baker, the official with overall responsibility for deciding whether the Hoffa investigation should be pursued. *Id.* at 71a. In his declaration, Baker confirmed that

the investigation into Hoffa's disappearance "still absorbs FBI management and field agent resources on a regular basis," and that "[i]t is my judgment that the investigation * * * warrants the continued efforts of the FBI." *Ibid.* Finally, in addition to these sworn declarations, the court of appeals and the district court conducted in camera review of the so-called "Moody file" and found that its contents dispelled any doubt concerning the prospect of future enforcement proceedings. *Id.* at 14a, 44a.[3]

2. Petitioner argues (Pet. 18-24) that even if there is a reasonable prospect of future law enforcement proceedings, the court of appeals erred in holding that release of the requested records could reasonably be expected to interfere with the proceedings.

Petitioner's FOIA request, however, seeks disclosure of all "[e]yewitness accounts * * * of the abduction of Mr. Hoffa" and all "[w]itness statements," as well as all "[s]cientific tests, including, but not limited to, blood samples, photographs, fingerprints, and analysis of tire treads and tracks." C.A. App. 15. He further requested the "[t]ranscripts and logs of

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[3] Petitioner argues (Pet. 16-17 & n.13) that a genuine issue of material fact is created by extrajudicial statements of other FBI personnel. The officials directly responsible for the investigation, however, represented that criminal prosecutions can be conducted and that the FBI is pursuing the investigation on that basis. It was proper to credit the official and considered judgment of the FBI on that question. Under these circumstances, the court of appeals did not err in affirming the district court's decision to grant summary judgment. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986) ("If the evidence [put forward by the party opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

any intercepts obtained in connection with * * * electronic surveillance orders," all search warrants "sought, or obtained" in the course of the investigation, and any affidavits submitted in support of such warrants. *Id.* at 16. Petitioner's request also encompassed "[a]ll writings concluding, finding, speculating or otherwise referring to what happened to James Riddle Hoffa, his body, and the identities of the persons responsible or involved in his disappearance and/or death." *Ibid.* In short, petitioner requested many categories of documents whose disclosure would self-evidently interfere with the ongoing investigation by providing a detailed road map of the government's past and future investigative efforts.

As the court of appeals concluded, the FBI made a sufficient showing of the adverse consequences of disclosing the information requested by petitioner. See Pet. App. 16a-18a. The FBI's declarations explain that disclosure of the requested documents would enable those responsible for Hoffa's disappearance "to learn the extent of the concrete information the FBI has in its possession and the thrust of our investigative efforts." *Id.* at 66a. The perpetrators could then frustrate the FBI's investigative efforts "by planting false leads, intimidating witnesses, and fabricating alibis." *Ibid.* Disclosure of the information also would jeopardize the FBI's ability to corroborate statements by witnesses and suspects. *Id.* at 58a, 67a-68a. Under these circumstances, the record demonstrates that disclosure "could reasonably be expected to interfere" with enforcement proceedings, as required by Exemption 7(A). See, *e.g.*, *Barney* v. *IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980)

(holding that "disclosure of such records as witness statements, documentary evidence, agent's work papers and internal agency memoranda * * * would necessarily interfere with such proceedings by prematurely revealing the government's case"); *Spannaus* v. *United States Department of Justice*, 813 F.2d 1285, 1287 (4th Cir. 1987).

Petitioner objects to the court's use of the Moody file in determining that the government properly invoked Exemption 7(A). He argues (Pet. 19) that the Moody file is not "representative" of the contents of the Hoffa files as a whole, and that it was an "advocacy document[]" designed to "include[] only fresh inquiries and other information that *supported* the Government's position." As the court of appeals explained (Pet. App. 8a-9a, 13a-14a), however, the file was assembled to familiarize Special Agent Moody with the status of the Hoffa investigation. The Moody file was not assembled with an eye toward placing it in evidence, and it was made part of the record only because the district court ordered respondent to submit it. See *id.* at 48a.

Petitioner also asserts (Pet. 20-21) that some of the document categories identified in the government's declaration are not sufficiently specific to allow meaningful evaluation of the potential effect of disclosure. As the district court explained, however, respondent "specifie[d] through the affidavits of Agents Llewellyn and Moody how disclosure could reasonably be expected to interfere with the prospective law enforcement proceedings and hinder efforts to bring those responsible to justice." Pet. App. 45a. The district court correctly determined that those decla-

rations specified the functional categories of requested documents[4] and established

> that disclosure would reveal the FBI's current knowledge regarding Hoffa's disappearance, the direction and scope of the current efforts[,] the leads abandoned and those individuals considered prime suspects. With such information[,] the perpetrator(s) could take steps to destroy or tamper with evidence, intimidate and threaten witnesses, construct a false alibi or fabricate other evidence. Also, disclosure could interfere with the ability to corroborate statements of witnesses or suspects. Each of these types of interference justif[ies] application of the exemption from disclosure under [Exemption 7(A)].

Ibid. Petitioner's fact-intensive claim to the contrary does not warrant further review.

Finally, petitioner argues (Pet. 22-23) that the declarations submitted by the government do not provide sufficient detail about the individual documents within each category. As discussed above (see pp. 9-10, *supra*), this Court has made clear that in contrast with other FOIA exemptions, Exemption

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[4] The Moody declaration specified that petitioner's request encompasses documents "detailing the FBI's theories regarding the case, investigative leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation." Pet. App. 66a; see also *id.* at 57a (Llewellyn declaration).

7(A) may appropriately be handled through a categorical approach. See *Robbins Tire*, 437 U.S. at 236. Accordingly, the courts of appeals have consistently followed that course, refusing to require the kind of document-by-document approach to withholding that petitioner advances here. See, *e.g.*, *North* v. *Walsh*, 881 F.2d 1088, 1097 n.13 (D.C. Cir. 1989); *Lewis* v. *IRS*, 823 F.2d 375, 379-380 (9th Cir. 1987); *Wright* v. *OSHA*, 822 F.2d 642, 645-646 (7th Cir. 1987); *Spannaus* v. *United States Department of Justice*, 813 F.2d at 1288-1289; *Curran* v. *Department of Justice*, 813 F.2d 473, 475-476 (1st Cir. 1987); *Barney* v. *IRS*, 618 F.2d at 1272-1274; *Moorefield* v. *United States Secret Service*, 611 F.2d 1021, 1023-1024 (5th Cir.), cert. denied, 449 U.S. 909 (1980).[5]

3. Petitioner argues (Pet. 25-26) that the court of appeals, in effect, refused to apply FOIA's requirement that the government release any "reasonably segregable" (5 U.S.C. 552(b)) nonexempt portion of a requested record. He contends (Pet. 25) that the court adopted a blanket rule refusing to apply that provision of FOIA to cases arising under Exemption 7(A).

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[5] In another case involving a request for the Hoffa files, the Eighth Circuit, sitting en banc, recently held that in a case arising under Exemption 7(A), the government is not required to submit a document-by-document index such as the one required in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). See *Crancer* v. *United States Department of Justice*, 999 F.2d 1302 (1993), petition for cert. pending, No. 93-700 (filed Nov. 3, 1993). We will furnish counsel for petitioner with a copy of our response to the petition in *Crancer*.

The court of appeals, however, merely held that "[o]n the record before us" (Pet. App. 19a), there was no significant prospect that "reasonably segregable" nonexempt materials could be extracted from the withheld records. As the court explained, if enough information were excised to make the records "useless to any lawbreaker," the redacted portions would similarly be "useless to [petitioner] and his newspaper." *Ibid.* FOIA requires only that the government release "*reasonably* segregable" portions of withheld documents. 5 U.S.C. 552(b) (emphasis added). It is well settled that a court may decline to require the excision of exempt information from withheld material when to do so "would render [the records] either nonsensical or perhaps too illuminating" of privileged matters. *Local 3, IBEW* v. *NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); see also, *e.g.*, *Doherty* v. *United States Department of Justice*, 775 F.2d 49, 53 (2d Cir. 1985). The court of appeals' routine application of that principle to this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT S. MCINTOSH
Attorneys

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